IN THE SUPREME COURT OF THE
STATE OF MISSOURI

JOEL C. BIANCO, ET AL.,	)	
	)	
Respondents,	)	
	)	
vs.	)	No. SC84046
MERAMEC VALLEY BANK,	)	
	)	
Appellant.	)	

SUBSTITUTE BRIEF OF RESPONDENTS

PAULE, CAMAZINE & BLUMENTHAL, P.C.
Thomas M. Blumenthal, MBE #25601
165 N. Meramec Avenue, 6th Floor
St. Louis (Clayton), Missouri 63105
Telephone No. (314) 727-2266
Facsimile No. (314) 727-2101

Attorneys for Respondents,
Joel Bianco, Individually and as Statutory
Trustee for Joel Bianco Kawasaki Plus, Inc.

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JURISDICTION STATEMENT

Respondents accept Jurisdictional Statement of Appellant.

STATEMENT OF FACTS

INTRODUCTION

Respondents Joel Bianco Kawasaki Plus, Inc. and Joel C. Bianco[1] respectfully believe that the Bank's Statement of Facts does not comply with Missouri Supreme Court Rule 84.04(c) in that the Statement is neither fair nor without argument. In fact, the Statement of the Bank is not supported by the Transcript in many places, ignores much of the evidence presented concerning the fraudulent misrepresentation.

The Bank requests in Footnote 1 of its Brief on Appeal that this Court take judicial notice:

> "of the facts previously heard by the Eastern District in the Replevin Case, *Meramec Valley Bank v. Joel Bianco Kawasaki Plus and Joel Bianco d/b/a Joel Bianco Kawasaki Plus*, Cause No. 97CC-003312, St. Louis Co., MO,

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[1] Respondents shall be collectively referred to in the singular as "Bianco," Joel Bianco Kawasaki Plus, Inc. separately shall be referred to as "JBKP" and Joel C. Bianco individually shall be referred to as "Mr. Bianco." Appellant Meramec Valley Bank shall be referred to as the "Bank."

reversed and remanded (Appeal No. 75991). Bianco similarly requested the Trial Court twice to take judicial notice of the filings in the Replevin Case. (Tr. Vol.I, p.41, ln 10-16; Tr. Vol.VII p.778, ln.7-12).

(Bank Br. 10)[2] The Bank also asks this Court to take notice of matters in the file of the Replevin Case which occurred *after* the trial in this instant Fraud Case, including pleadings filed by Respondents on remand of that case. (Bank Br. 11-12)[3] The Bank also refers this Court to the brief filed by Bianco in the court of appeals in the instant case below (Bank Br. 46), and to the opinion of the court of appeals in the instant case below (Bank Br. 73). Although the statement cited is repeated in this Brief, the practice of referring to the prior

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[2] The Bank's Substitute Brief here shall be referred to in this Brief as "Bank.Br." followed by a page number. The initial volume of the transcript covering the testimony on November 15, 1999, pages 1-102 is unnumbered as a volume. Volume I, covering the testimony on Tuesday morning, November 16, 1999, is also numbered beginning with pages 1-124. The November 15 transcript will therefore be referred to as "Vol. 11/15," and the November 16 transcript will be referred to as "Vol. I." The transcript will be referred to as "Tr." followed by the page number with reference to the volume number only for Vol.11/15 and the Vol. I. The Legal File will be referred to as "L.F."

[3] To avoid confusion, Respondents will refer to the instant case on appeal, No. SC 84046 as the "Fraud Case" to distinguish it from the "Replevin Case" previously decided at **Meramec Valley Bank v. Joel Bianco Kawasaki Plus, Inc**., 14 S.W.3d 684 (Mo.App.E.D. 2000).

brief is contrary to Missouri Supreme Court Rule 83.03(b). The opinion of the court of appeals below is inappropriate because this case is before this Court as if on original appeal. **Board of Ed., Mt. Vernon Schools, Mt. Vernon v. Shank**, 542 S.W.2d 779, 780 (Mo.banc 1976). Respondents believe that all of these requests are highly inappropriate and should be ignored or stricken by this Court.

Pleadings in the Replevin Case which were not filed until *after* the remand of the Court of Appeals for the Eastern District on March 28, 2000 were clearly not before the trial court or jury in the instant Fraud Case, and are irrelevant to the issues here on appeal. This is not a new concept to the jurisprudence of appellate practice. "When a case has been tried and an appeal taken from the judgment, the record of the case as made in the trial court is not a loose-leaf ledger so as to permit insertion of matters subsequently transpiring, but the record constitutes a closed book binding on the parties to the suit." **Shepard v. Shepard** 353 Mo. 1057, 1066-1067, 186 S.W.2d 472, 477- 478 (1945).

This Court has clearly indicated that legal arguments should be confined to the material submitted in the case directly before the trial court. No compelling reason exists to depart from this rule.

Bianco corrects the Bank's Statement of Facts as follows:

THE PROCEDURAL HISTORY OF THE FRAUD AND REPLEVIN CASES

Bianco believes that it is essential to an understanding of this case to follow the chronological filings as reflected in the record and in the Replevin Case as reported by the

Court of Appeals for the Eastern District. The following tracks the history of the two cases at issue:

October 3, 1997 Replevin Case filed. Meramec Valley Bank, supra, 14 S.W.3d at 686.

October 6, 1987 Fraudulent Misrepresentations made by Messrs. Jones and Kopsky. See, Statement of Facts, infra., *passim*.

November 17, 1987 Respondents counsel checks court file for service of process in Replevin Case and finds no sheriff's return. Meramec Valley Bank, supra, 14 S.W.3d at 686.

November 24, 1997 Sheriff's return of service filed and Bank files Motion For Interlocutory Order of Default. Meramec Valley Bank, supra, 14 S.W.3d at 686.

December 10, 1997 Petition filed in the Fraud Case. L.F. 1, 7-26.

February 18, 1998 Bank's Answer filed in Fraud Case. L.F. 1, 27-35.

Affirmative Defense is made to Count III - Conversion, and Count IV - Interference With Contractual Relations, on grounds of legal authorization for actions by Order of Court in Replevin Case but no reference of the Replevin Case in response to Count II - Fraud, and no defense of Compulsory Counterclaim raised. L.F. 34, ¶5.

April 15, 1998 Fraud Case set for trial December 7, 1998. L.F. 2

October 22, 1998 Fraud Case continued and reset for trial February 8, 1999. First continuance L.F. 2.

January 22, 1999	Fraud Case continued and reset for trial May 17, 1999. Second continuance. L.F. 2.
February 26, 1999	Hearing held on interlocutory order of default in Replevin Case. James R. Jones testifies. Meramec Valley Bank, supra, 14 S.W.3d at 687.
March 4, 1999	Judgment of Default entered in Replevin Case. Meramec Valley Bank, supra, 14 S.W.3d at 687.
March 23, 1999	Respondents move to set aside default in Replevin Case. Meramec Valley Bank, supra, 14 S.W.3d at 687.
May 5, 1999	Fraud Case set for trial on August 2, 1999. Third continuance. L.F. 2.
August 2, 1999	Date of trial setting. Parties appear in court. Fraud Case, Amended Answer filed, L.F. 39. Fraud Case, Motion To Dismiss "on grounds of collateral estoppel, res judicata, and Missouri Rule of Civil Procedure 55.32(a)" filed, L.F. 48. Fraud Case, Plaintiff's Response To Defendant's Motion To Dismiss filed. L.F. 56-80. Fraud Case continued and reset for trial on November 15, 1999. Fourth Continuance L.F. 2.

No ruling on Motion To Dismiss was placed on the record in the Fraud Case. Deemed taken with the case.

November 15-18, 1999	Trial of Fraud Case.
November 18, 1999	Fraud Case, Defendant's Motion For Directed (sic) At The Close of Plaintiff's (sic) Evidence. No mention of claim of compulsory counterclaim in motion. L.F. 81-83. Fraud Case, Motion for Directed Verdict at Close of All Evidence based on previously filed written motion at close of plaintiffs' case. No mention of compulsory counterclaim. Tr. 867-868.
March 28, 2000	Replevin Case reversed and remanded. Meramec Valley Bank, supra.

THE HISTORY OF THE DEALERSHIP FINANCING

The manner in which the JBKP dealership was set up was very complex. The discussions among the various creditors were delicate and protracted over days. It was essential to an understanding of what took place on October 6, 7 and 8, 1997 to understand this complexity, and much time was spent explaining it to the jury. This is not because it was in any way related to the Replevin Case as the Bank so glibly asserts (Bank Br. 46), but because it was necessary to understand the relationship between Bianco and his supplying manufacturers, and the Bank has conveniently omitted all of it. Bianco respectfully suggest that reference to ***all*** of the testimony would reveal the following:

Frances C. Love was married to Noel Bianco who in 1973 came to St. Louis and bought a small Oldsmobile store on Watson Road which ultimately expanded into several stores. (Tr. 635-656) One of their children is Joel C. Bianco. (Tr. 635) Mr. Bianco started in the automobile business working for his father when he was thirteen years old. (Tr. 396) In 1994, he started a dealership selling jet skis, watercraft and motorcycles manufactured by Kawasaki, Suzuki, Polaris and Seadoo. The dealership was a corporation called Joel Bianco Kawasaki Plus, Inc., a Missouri corporation whose charter had lapsed as of the time of trial. (Tr. 397-398) The dealership was unique in that it was geared toward families, and included an indoor water tank which floated the Seadoo product so that customers could get on the vehicle in the water, and families could walk out on the dock. A sixty inch television screen allowed customers to watch promotional videos of the product. Accessories were also sold (Tr. 400-402)

JBKP took out a Small Business Administration Loan ("SBA") with the Bank to finance the start of the business, half of which was used for that purpose, and half of which was invested back into the Bank as collateral. (Tr. 404-405) The $45,000 loan was guarantied by the SBA to the extent of 90% in the event of a loss, as well as secured by a lien on the inventory, equipment and receivables of JBKP. (Tr. Vol 11/15, pp. 4-5, p. 45). Della Moon, Mr. Jones assistant and Vice President of Commercial Lending (Tr. 2), performed an analysis of the JBKP loans in Trial Exhibit 8 and clearly showed the SBA guaranty as guarantying that loan.(Tr. 11/15, p. 44- 45) James R. Jones, the Vice-President

of the Bank who controlled these events,[4] acknowledged that he could look to the SBA for repayment of any shortfall. (Tr. 312) In spite of this fact, when Mr. Jones valued the collateral on the SBA loan in determining his anticipated "shortfall", he valued the collateral as zero. (Tr. 246-247, Trial Exhibit 5). The loan which was originally $45,000 was reduced to $27,147.00 at the time of the incidents involved in this lawsuit. (Tr. Vol. 11/15, p. 45)

Much of the inventory of JBKP was financed through a process call "floor plan financing" whereby the inventory is placed on the showroom floor and is paid for as it is sold. (Tr. Vol. 11/15, p. 8-9; Tr. Vol. I, p. 7) The second loan which JBKP took out from the Bank was a floor plan financing of three (3) Ski Nautique Boats. (Tr. Vol. 11/15, p. 8-9) The loan was for $75,000.00. (Tr. Vol. 11/15, p. 6; Tr. 407) The loan had been paid down by $41,801.00 and then drawn on again during the life of the business. (Tr. 295) The balance at the time of the incidents in question, together with interest accrued, was $72,843.24, secured by 3 boats valued at a minimum of $50,000.00. (Tr. 247, Trial Exhibit 5)[5]

In addition to the Ski Nautique Loan, JBKP also had floor plan financing arrangements with Bombardier Capital, Inc., who provides commercial financing for

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[4] Mr. Jones' family owns 95% of the Bank. (Tr. 222-223)

[5] Mr. Bianco testified that the 3 boats, if sold at retail, would yield a gross profit of $90,000.00. (Tr. 408) They were sold through foreclosure and yielded $56,321.50. (Tr. 307)

Seadoo, among others, (Tr. 3 - 4), Kawasaki Motors Finance Corporation (Tr. 408 - 409; 605); Suzuki (Tr. 399) and Polaris (Tr. 397). Credit from Kawasaki started at $200,000.00 (Tr. 409) and rose to over one million dollars ($1,000,000.00) in four years. (Tr. 410 - 411). Credit from Bombardier/Seadoo started at $200,000.00 and rose to $750,000.00 in two years. (Tr. Vol. I, P. 8; Tr. 411) The others offered credit at various amounts at various times.

These floor plan financing arrangements were secured by purchase money security interests. Nauni Jo Manty and Donald W. Paule, both attorneys, one for Bombardier and one for the Bianco, explained the concept of "purchase money security interests" to the jury. The purchase money security interest, controlled by Article 9 of the Uniform Commercial Code, Chapter 400 of the Revised Statutes of Missouri, (Tr. 134 - 135)[6] allows the creditor to have a "super priority security interest in the collateral"so that there is no equity remaining in the collateral. (Tr. 137 - 138, 360) This interest is perfected by filing UCC statements and by sending a written notice to all parties who have previously filed financing statements. (Tr. 138 - 139)[7] By filing such a notice, as in Trial Exhibit 110, the creditor puts all other creditors of record on notice that the collateral belongs to that creditor, that all others should "leave it alone," and that the filing secures or covers

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[6] The trial court took judicial notice of this statute at Tr. 134.

[7] Trial Exhibit 1 listed all of the outstanding UCC filing statements against JBKP. Trial Exhibit 7 were copies of all such statements. Tr. Vol. I, p. 23 - 24; Tr.140 - 141, 231.

100% of the collateral. (Tr. 144 - 145) Bombardier had filed such a written notification to Meramec Valley Bank by registered mail as reflected in Trial Exhibit 110. (Tr. Vol. I, pp. 25 - 26; Tr.140 - 141)

In 1997, JBKP had a fifteen thousand square foot showroom in Valley Park, Missouri, and three warehouses, a total of 21,000 square feet in four locations. (Tr. 413) JBKP also placed vehicles in various centers around the State of Missouri as displays and advertising for the business. (Tr. 412 - 413). Manufacturers each would perform monthly audits to determine the status of the floor plan financing arrangements. Vehicles which were not accounted for in these audits were considered "Sold and Unpaid" and had to be accounted for by JBKP. (Tr. Vol. I, p. 10) As a result of the placements of display vehicles, Mr. Bianco would have to reconcile the monthly audits of each manufacturer to identify the vehicles not in his showroom before JBKP and the manufacturers could get an accurate count of the Sold and Unpaid merchandise. Vehicles could be in as many as twenty (20) locations. (Tr. 411 - 413) As a result of this complicated procedure, JBKP was in a Sold and Unpaid status from the first vehicle sold, and remained continually in a Sold and Unpaid status. (Tr. 414 - 415) Conversely, incentive programs left the manufacturers owing JBKP money which would be reconciled at the end of each year (Tr. 429), and were unreconciled at the time as of the October 6-8 time period.

To further secure the floor plan financing for Bombardier/Seadoo and for Polaris beyond the purchase money security interests, JBKP obtained two irrevocable letters of credit from the Bank. The Bombardier Letter of Credit was for $100,000.00 (Tr. Vol.

11/15, p. 9 - 10, 13; Tr. 417; Trial Exhibit 2). It was secured by business assets of JBKP, a $25,000.00 money market account from Mr. Bianco, and a $25,000.00 money market account from his mother, Frances Love. (Tr. Vol. 11/15, p. 10; Tr. 419) As of October 6, 1997, the day of the initial replevin, and the day Bianco claimed the misrepresentations in question were made, the Bombardier Letter of Credit was not drawn upon, its balance was zero, and there was collateral pledged against it of $54,164.00. (Tr. Vol. 11/15, p. 46; Tr. 246, 250; Trial Exhibits 5 and 8) The Polaris Letter of Credit was for $40,000.00. (Tr. Vol. 11/15, p. 19, 47; Tr. 420; Trial Exhibit 17) It was secured by business assets of JBKP and a $24,070.00 account of Mr. Bianco. (Tr. Vol. 11/15, p. 47 -48; Tr. 420) As of October 6, 1997, the Polaris Letter of Credit was not drawn upon, its balance was zero, and there was collateral pledged against it of $24,070.00. (Tr. Vol. 11/15, p. 47; Tr. 246, 250; Trial Exhibits 5 and 8)

Over the course of the existence of JBKP, the company always had maintained its deposits with the Bank, and at times had deposits as high as $900,000.00 in one month. (Tr. 424) The Bank never expressed concern about JBKP's credit to Mr. Bianco prior to September of 1997. (Tr. 428 - 429) While the Bank acknowledged that its "collateral is weak," and that the operation should be monitored on a monthly basis by reviewing in-house statements, (Tr. Vol. 11/15, pp. 33-35; Trial Exhibit 14), the Bank did not get monthly financial statements, and the recommendation of Bank officers to perform due diligence was not followed by the Bank. (Tr. Vol. 11/15, pp. 36 -37) The Bank generally received the collateral it asked for from JBKP, (Tr. Vol. 11/15, pp. 46, 49; Tr. 229-230), and was

aware that in early 1997 JBKP had made extensive capital improvements and was having cash flow problems as a result, but that Mr. Bianco intended that the Bank would be paid in full as a result of any sale of the business. (Tr. Vol. 11/15, pp. 50 - 51)

In July or August of 1997, marketing efforts for JBKP took Mr. Bianco to California. About this time he was approached by a broker who said there were several buyers who would have an interest in buying the business. This seemed to coincide with an idea of Mr. Bianco's to expand his business by adding stores down the Highway 44 corridor and adding other manufacturer lines to make the business a comprehensive sport vehicle business. Mr. Bianco could sell JBKP, keep his name on the store, and become a consultant to it, while allowing someone else to attend to the bookkeeping which was his weakness. The concept was attractive enough for him to want to pursue it. (Tr. 432 - 433) He received one written offer for $645,000.00, and another for $500,000.00. (Tr. 434)

As a result of an unsuccessful contact with a prospective buyer named Binns, Mr. Bianco began receiving complaints from manufacturers. Specifically, Suzuki contacted JBKP and demanded to be brought current on its sold and unpaid amounts of $32,000.00. (Tr. 436) Mr. Bianco had been negotiating with his landlord, Nevan Fisher, and Mr. Fisher's agent, Tom Maurer, and had them advance $32,000.00 against an ultimate purchase of the business to pay Suzuki and cover the demand. (Tr. 437) Mr. Bianco voluntarily advised the Bank through Della Moon that he was in a sold and unpaid position with the manufacturers of over $300,000.00, as well as advising the Bank about his contacts with Messrs. Fisher

and Maurer. (Tr. Vol. 11/15, pp. 42 - 43) This prompted the Bank to begin a series of analyses of the JBKP credit status, the last being on October 7, 1997 in Trial Exhibit 5.[8]

Contemporaneously, but unbeknownst to the Bank or Mr. Bianco, the manufacturers began protecting their positions by filing replevin lawsuits in the Circuit Court of St. Louis County and obtaining orders of delivery, which each agreed to standstill and not execute on while negotiations were ongoing. Bombardier Capital, Inc., Polaris Acceptance Incorporated, and Kawasaki Motors Finance Corporation all filed replevin suits in September, 1997, (as referenced at Bank Br. 19-20) to protect their interests, without executing on the replevin orders.

The Bank performed a Uniform Commercial Code search of the filed security interests against JBKP on September 30, 1997 at the direction of Mr. Jones. (Tr. 231 - 234, Trial Exhibits 7 and 114) The Bank also acknowledged that it learned on October 3, 1997, that Bombardier and Kawasaki had Purchase Money Security Interests in their

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[8] Because Bianco believed that Trial Exhibit 5 was an important piece of evidence to demonstrate the intent of the Bank at the time the representations were made, the second page of the Exhibit (the first being a facsimile transmission cover sheet) was blown up and shown to the jury at various phases of the trial, including during the testimony of James Jones. (Tr. 245 -246) It is included here for the benefit of the Court at Appendix A-005. Other trial Exhibits mentioned in this Brief, though not all, are also included in the Appendix.

respective inventory at JBKP, and had filed suit. (Tr. 234, 719 - 720) The Bank never sent JBKP or Mr. Bianco a notice of default. (Tr. 238) In spite of this, on October 3, 1997, the Bank authorized the commencement of the Replevin Case, Case No. 97CC - 33127C, at which time Mr. Jones was aware of the lawsuits filed by the various creditors, and learned that none of them were moving any inventory out of the showroom. (Tr. Vol. I, p. 41; Tr. 235 - 237, 793)

As of October 6, 1997, an analysis of the Bank's then existent exposure as shown in Trial Exhibit 5[9] and the testimony of Ms. Moon and Mr. Jones would show that the Bank was truly over-collateralized although it claimed a shortfall of $129,069.10.
This became, again according to Mr. Jones, a shortfall of $104,069.10 including attorney's fees and costs of the replevin, and after deducting the $25,000.00 received on October 6th. (Tr. 300) Neither the Bombardier nor Polaris letters of credit had been called at this time in a form Mr. Jones would recognize.

THE MISREPRESENTATIONS AND FRAUD

Against this background, the following describes the evidence presented at trial, but omitted from Appellant's Brief, concerning the fraudulent misrepresentations of the Bank:

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[9] Mr. Jones identified Trial Exhibit 5 and testified about its contents at great length. Tr. 245 - 252. The exhibit was presented to Bianco's counsel on October 7th and reviewed by representatives of the Bank. Tr. 337.

Bombardier had sent to the Bank Trial Exhibit 3, the demand on the letter of credit, on October 2 or 3, 1997, to be on the safe side because the letter of credit was nearing its time to expire. (Tr. Vol. I, pp. 28 - 29) However, there was still a possibility that if the deal went through, Bombardier would not have needed to call the $100,000.00 letter of credit. (Tr. Vol. I, p. 91) Had it recovered the letter and also more than it was owed, it would have returned the excess money to the Bank. (Tr. Vol. I, p. 92) Bombardier had other dealers who had higher sold and unpaid balances than JBKP. (Tr. Vol. I, p. 64)

Mr. Bianco saw Mr. Jones on the morning of the October 6, 1997, in the showroom, and Mr. Jones simply kept repeating the he needed to be paid in full. (Tr. 445) Mr. Jones demanded $240,000.00 in "liquid cash." (Tr. 446, lines 1 through 14) "I need $250,000.00 to feel good," Mr. Bianco quoted Mr. Jones as saying. (Tr. 446, lines 21 through 23) Mr. Jones admitted that he demanded $240,000.00, but claims it was in security, not cash, and in confusing testimony seemed to indicate it was $240,000.00 in total security, though at one point he said "additional security." (Tr. 241 - 245) While he was at the store, Mr. Bianco saw the Bank remove numerous motorcycles, ATVs, helmets, TVs including the 60-inch TV, computers, displays, boats, and parts. (Tr. 462, lines 15-23)[10]

Mr. Bianco left the dealership to try to obtain assets to satisfy the Bank. After making several calls, Mr. Bianco came back that afternoon and offered "everything he had":

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[10] This replevin included manufacturers' inventory covered by purchase money security interests.

a deed on his house, his equity in a pleasure boat, and the $25,000.00 he borrowed from his mother.[11] (Tr. 449) Until now, Mr. Bianco had strongly resisted putting his house up as collateral for the business. He had refused when Della Moon asked that the house be used as security for the SBA loan. He offered it now because he felt he would have it back in a few days or maybe weeks when the sale was consummated. He didn't feel he was giving up anything, "[i]t was allowing the sale to finish." (Tr. 449-450) Mr. Jones accepted this offer and Mr. Bianco told him all he wanted in return was "simply to let the sale finish." (Tr. 450) Mr. Jones replied that he accepted that that would be the case. (Tr. 450-451) The sale Mr. Bianco wanted to finish was with Messrs. Maurer and Fisher, the proceeds of which would go to the manufacturers, with only $90,000.00 to Mr. Bianco for used vehicles, as well as a consulting agreement for Mr. Bianco for $5,000.00 a month. Mr. Bianco intended to give the $90,000.00 for the used vehicles to the Bank. (Tr. 452, 528-529; LF 205, 266-267)[12] Mr. Bianco felt that the debt to the Bank would be satisfied in the

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[11] The trial court found, in sustaining the motion to dismiss her from the Fraud Claim, that Frances Love by making her $75,000 in advances to JBKP was a creditor of JBKP. Tr. 687, lines 10-12.

[12] Note below that the Bank was only looking for $100,000.00 on October 8, 1997, when all was said and done. Had the sale gone through as intended without interference, they would have been no more than $10,000.00 short, assuming they were owed that much. In addition, had the sale gone through, neither the Bombardier not the Polaris letters of credit would have been called. See, Statement of Facts, infra.

transaction. (Tr. 453) The agreement Mr. Bianco signed with Mr. Fisher provided that the buyer would pay an amount in cash at closing to satisfy the manufacturers, "as well as any applicable letters of credit." (Tr. 556-557, 559, Trial Exhibit 12)

Mr. Jones for the Bank and Mr. Bianco for Bianco entered into an agreement to partially memorialize the events of October 6 and their understandings about them. Mr. Jones admitted that Trial Exhibit 36,[13] the standstill agreement he signed with Mr. Bianco on the evening of October 6 at 7:00 p.m. (Tr. 265)[14], doesn't describe the collateral Mr. Bianco is providing (Tr. 269), and doesn't describe what is meant by "a resolution among all the parties" on either October 7 or October 8 or as a condition to the Bank placing a security guard within the premises. (Tr. 274-275, 833) Mr. Jones also testified that the agreement allows a security guard on the premises, but not a truck, (Tr. 276) until the Bank *advises* Mr. Bianco that a resolution could not be achieved. (Tr. 276-277) Mr. Bianco stated that Trial Exhibit 36 is not the entire agreement, there was a verbal portion to

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[13] Trial Exhibit 36 is attached as Appendix A-003.

[14] Trial Exhibit 36 was not signed or dated October 7, 1997, nor was Fran Love nor any attorney present at the meeting were it was signed (according to any testimony), contrary to what is stated at Bank Br. 23-24. Only Mr. Jones and Mr. Bianco were present. The attorneys communicated by telephone. (Tr. 264-271) Ms. Love was not at either meeting on the 7th or 8th (Tr. 567, 640) and she never offered Mr. Bianco any additional collateral above the funds on the 6th. (Tr. 567) The money Ms. Love provided on the 6th was the most she could come up with, and she had to borrow that amount. (Tr. 639)

it. (Tr. 544) Mr. Bianco thought that the agreement included the Bank cooperating in every way to assure that the sale was completed, that the Bank specifically take actions to see that it happened. (Tr. 548)

Mr. Bianco thought that the replevin had stopped in the afternoon when he came to an oral agreement with Mr. Jones, but learned that it continued into the night. (Tr. 454-455, 546, 550) Mr. Jones testified that the replevin at the showroom had ended but that the replevin at the warehouse continued on into the evening, after he signed Trial Exhibit 36 with Mr. Bianco, until the Bank could fill a truck. (Tr. 270-271)

When Susie McFaul, Director of Recovery for Bombardier, first learned of the Bank's replevin of her inventory from the dealership, she contacted Paul Kopsky, attorney for the Bank. His response to her demand for return of her collateral was "tough." (Tr. Vol. I, pp. 26 -27) Nauni Jo Manty, Bombardier's attorney, wrote to Mr. Kopsky by facsimile on October 7 demanding the return of the Bombardier collateral: ". . . please be advised that BCI has a Purchase Money Security Interest superior to that of the bank. BCI hereby demands turnover of its collateral within twenty-four hours. . .". (Tr. 146 - 149, Trial Exhibit 19) Mark Bossi, on behalf of Kawasaki Motors Finance Corporation, also wrote to Mr. Kopsky on October 6 by facsimile transmission, identifying "a first priority Purchase Money Security Interest," and demanding immediate surrender of the collateral. (Tr. 604 - 606, Trial Exhibit 91) Mr. Bossi wrote a second letter on October 7, by facsimile, wherein he noted that four trailers of the dealership's inventory had been taken

(on October 6) and that "that product included products distributed by or Kawasaki was claiming a first priority security interest in." (Tr. 607 - 608, Trial Exhibit 92)[15]

In spite of all demands, the Bank did not return the inventory. Della Moon, on behalf of the Bank, testified that she was aware in conducting her analysis of the loans that the new inventory on the showroom floor was all covered by purchase money security interests which took precedence over the Bank's security interest. (Tr. Vol. 11/15, P. 93)

Bombardier never told the Bank it wanted the Bank to hold the inventory. (Tr. Vol. I, p. 52; Tr. 171) By the end of the week of October 6th all of the collateral was gone. (Tr. 172) The Bombardier Letter of Credit was not paid until December 9, 1997, and the inventory was not finally returned until late January of February, 1998. (Tr. Vol. I, p.54)

The Bank in its Brief incompletely describes meetings on October 7 and 8, 1997.

A meeting was held on October 7 with representatives and counsel of JBKP, the buyer and the Bank. Mr. Paule, attorney for Bianco, testified that Mr. Kopsky told him on the 7th that Mr. Kopsky wanted Mr. Paule to know that the Bank was willing to compromise its demand by $17,000.00 to get a deal done but he was not going to tell the others as his initial position, and that the Bank was going to present the higher numbers to the buyer and the manufacturers and ask them to pay the whole amount. (Tr. 337, line 19 through 340, line 20; Tr. 391, lines 14-22) The general discussion on the 7th was that it was in

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[15] Trial Exhibits 19, 91 and 92 are attached as Appendix A-009, A-012 and A-013.

everybody's best interest to close the sale. (Tr. 341-342, 344) Gary Feder, representing Mr. Fisher, the buyer, told Mr. Kopsky that the continuation of the replevin was going to kill the deal. (LF 228-229)

A meeting was held on October 8 with all interested parties. None of the other creditors were demanding attorney's fees at the meeting on the 8th, and there was "a cry of protest" at the Bank's demand for fees. There was also a belief that the amount demanded by the Bank was "outrageous." (Tr. 347, lines 5-20) Mr. Bossi said the Bank's position was "ridiculous." (Tr. 612, lines 3-5) At some point in the meeting, the parties broke up into small groups, and Mr. Kopsky approached Mr. Paule and told him that the Bank had reached a deal with the manufacturers and the Bank needed $50,000.00 more from Respondents. Mr. Kopsky refused to disclose what the deal with the manufacturers was, claiming it was secret. Mr. Paule was "dumbfounded," and went to ask the manufacturers if Mr. Kopsky's position was true. The manufacturers responded that the claim was "absurd." The only concession discussed was an offer of a $50,000.00 discount from Bombardier. (Tr. 351, line 18 through 354, line 7)

According to Ms. McFaul, the negotiations were not successful because of the actions of the Bank. (Tr. Vol. I, p. 122) It came out in the testimony of Ms. Manty, *on a question asked by Bank's counsel without objection*, that the reason Messrs. Maurer and Fisher came to the October 8th meeting wanting a $100,000.00 reduction in their obligation to make whole the sold and unpaid balances was "because of what occurred at the dealership. . . . Because of the bank's replevin they needed to put back computers, re-carpet,

there was damage that occurred." (Tr. 207, line 21 - 208, line 6; see also, Tr. 160, lines 3 through 14) Bombardier considered the Bank's actions at the October 8th meeting to be in bad faith. (Tr. 169) Ms. Manty, on behalf of Bombardier, was not aware of any legitimate business justification that the Bank had for taking the Bombardier inventory. (Tr. 183)

Ms. Manty was shown Trial Exhibit 34,[16] a letter from Mr. Kopsky (on behalf of the Bank) to Mr. Feder (on behalf of Mr. Fisher). She was asked if she was aware of the Bank's position coming into the October 8th meeting. Her response was:

A. Well, to the extent that what it says in this letter.

Q. (Mr. Dillon) Okay. Is it fair to say the bank's position at the meeting on October 8th was consistent with the position that it took in that letter?

A. No.

Q. No?

A. It says, "The bank understands the concerns of the manufacturers in regard to the monies which will be deposited and the bank is willing to work with the manufacturers in this regard."

[16] Trial Exhibit 34 is attached at Appendix A-007.

> You know, it leads you to believe the bank is willing to work with the manufacturers, and they did nothing but basically screw the whole thing up.

(Tr. 196, lines 6 through 24)

Mr. Jones, the Bank's main representative, acknowledged that Trial Exhibit 35,[17] which was sent by facsimile to Mr. Bossi ***and to Mr. Chorlins on behalf of the Respondents***, specifically stated: "***Meramec Valley Bank is prepared to make a substantial effort with all parties concerned to resolve this matter,***" and that Mr. Jones agreed with that statement. (Tr. 301, line 12 through 302, line 13) It was sent on behalf of Mr. Jones and was intended to be a statement accepted as "what the bank was prepared to do." (Tr. 302, lines 14 - 21)[18]

Mr. Kopsky, who wrote Trial Exhibit 35, testified at the meeting on October 7th, "I made a commitment that the bank was willing to do what I consider its share to compromise the matter. . . . ***My understanding was there would be some financial commitment by the bank***; yes sir." (Tr. 834, lines 1 through 9, emphasis added)

Mr. Bossi, who received Trial Exhibit 35, stated in response to a question from the Bank's attorney:

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[17] Trial Exhibit 35 is attached at Appendix A-001.

[18] The trial court found the letter to be unambiguous and not requiring explanation. Tr. 606 -607.

Q. Do you know if the bank had changed its position at all between the time you first talked to Mr. Kopsky and when the meeting came around October 8th in terms of what the bank was going to do?

A. I don't know what the bank's original position was but when - - when he sent me the letter dated October 6th of 1997 he said that the bank was prepared to make a substantial effort with all parties concerned to resolve this matter. So I assumed that his position originally was we want to be paid in full, his position had softened at that time - - -

(Tr. 629, line 17 through 630, line 3) Mr. Bossi testified that when the bank representative and Mr. Kopsky told everyone on October 8th that the Bank was not willing to discuss any compromise in its claim, and it just wanted to get its inventory, the meeting broke down. (Tr. 619, lines 7 through 24) Mr. Bossi had told everyone that Kawasaki was willing to participate in taking a loss. "The purpose of the meeting was to try to reach a resolution so it would be a win/win for everyone." (Tr. 613, lines 3 through 18)

Ms. Manty testified that the Bank was unwilling to reduce its amount owed in any way. (Tr. 159, line 20 through 160, line 2)

Jim Jones was aware that if the showroom was emptied a sale could not proceed. In a letter he wrote to the SBA two weeks after the incidents in question, in his own words he stated:

> . . . Monday, 10/6/97 we began repossession of all the inventory, equipment, furniture and fixtures within the showroom and two warehouses. During the removal of the inventory our borrower, Mr. Bianco appeared and begged for us to stop the replevin. He indicated that if the showroom was emptied, the sale would not proceed and promised to pledge another twenty-five thousand in cash and a third Deed of Trust in his home with an estimated $20,000.00 in loanable equity for us to stand still on the replevin."

(Tr. 303 - 304; trial Exhibit 115)[19]

This coincides with the testimony of many of the witnesses concerning the value of a going concern to the transaction. Ms. Manty testified that everyone's interest was to put the status quo back in place because "a business has more value when it's operating." As a result, Bombardier came to the meeting on the 8th prepared to compromise its position by $50,000.00. (Tr. 154, lines 1 through 20) Mr. Bossi stated that Kawasaki believed that if the dealership were sold to the purchaser, the loss taken by the creditors would be less than if each took back their inventory. (Tr. 613, lines 3 through 18) According to Ms. Manty, Mr. Maurer indicated that the proposal was to make the manufacturers whole and to use the existing collateral that was on the showroom floor. (Tr. 155-156)

The Bank sets out in its Brief statements concerning Mr. Fisher returning to the meeting on the 8th and stating that trucks had arrived at the dealership to recommence the

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[19] Trial Exhibit 115 is attached as Appendix A-014.

replevin, stating that the testimony was not offered for the truth of the matter. (Bank Br. 25-26) This is true about an exchange with Ms. Manty which occurred during her direct exam. (Tr. 165 - 168) Ms. Manty testified that Messrs. Feder, Maurer and Fisher returned from lunch and announced that the trucks were at the dealership with the motors running waiting to begin the replevin, to which neither Mr. Kopsky nor Mr, Jones made any denial. (Tr. 168, lines 1 through 23) Mr. Kopsky admitted that he made no response. (Tr. 842) Messrs. Maurer and Fisher walked out at that point, saying the action was bad faith. Ms. Manty also considered it bad faith. (Tr. 169, lines 5 through 22)

However, the matter of the recommencement of the replevin was mentioned numerous other times without objection. Joel Bianco testified without objection:

> Q. And what was said when it ended?
>
> A. Well, specifically, "There are trucks on your lot running, removing equipment."
>
> Q. And who made that statement?
>
> A. My buyers.

(Tr. 459, line 24 through 450, line 3) Mr. Paule had previously testified without objection: "about the time that Maurer and Fisher were telling that they had found out that there was a repossession going on and they were yelling and screaming, I had to leave . . ." (Tr. 359, lines 13-15) He repeated this without objection at Tr. 391, lines 10-13.[20]

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[20] The Bank cites a colloquy with the judge during arguments on motions that

the matter was not offered for the truth of the matter at Bank Br. 25, with a reference to ft. 17, citing "Tr.Vol.VI, p.682, ln. 21-24," but ignores the judge's comments at Tr. 458, lines 3-7. The passage quoted by the Bank is misleading, as the trial court obviously didn't feel the matter had been preserved. The Bank attempts to correct this by another footnote 18 on the same page, but now claims that the issue is unclear as to whether the objection was continuing. The record shows otherwise.

"THE COURT: We haven't been addressing it, unfortunately. We went in for almost a day and a half in trial saying everything that everybody else said, and all of a sudden somebody's going to try and pull in the reigns on the hearsay." (Tr. 682, lines 2-6)

"THE COURT: I don't know if you - - you did come up to the side bar and did say - - you did not ask to prove the truth of the matter stated, but just to show that the meeting fell apart." (Tr. 682, lines 21-24, emphasis added)

Bianco respectfully suggests that this shows there was no definitive ruling covering every time the statements were admitted, and no preservation of an objection by the Bank. In fact, the Bank did raise its objection when it thought of it, and asked that the testimony be stricken, See, Tr. 618, line 24 through 619, line 6. It obviously did not think it had a continuing objection. In addition, the Bank never sought a limiting instruction to the jury.

In one of the specific passages cited by the Bank at Bank Br. 26, ft. 18, but not quoted, the trial court states: "I think its been testified to by a lot of different people that after Maurer and the other guy came in and raised hell about the ongoing replevin, I don't

St. Louis County Deputy Sheriff Curley Hines remembered seizing quite a bit of property on October 8th *before* everybody "went to Clayton to go into a meeting." (Tr. 851, lines 10-17) He stated they seized property all that morning. (Tr. 851, lines 18-24)[21] He also remembered talking to Mr. Merle (stated as "Merely", a Bank representative) that afternoon. (Tr. 852, lines 2-21)

Even accepting the Bank's version of the facts, which was that the trucks did not begin loading until after the meeting broke upon the 8th, Mr. Jones admitted that ordering the trucks to return to the side of the dealership was the first step in re-commencing the replevin. (Tr. 766, lines 19-22) He testified that he made the decision to order the trucks back the evening of the 7th because he did not have a signed agreement with anyone to pay him more money than he had received from Mr. Bianco on the 6th. (Tr. 734-735) After the

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have a problem (with) him testifying that was said by somebody." (Tr. 458, lines 3-7)

[21] This testimony should not be lightly dismissed, as the Bank would have it. (Bank Br. 26) It is unlikely that Mr. Hines would confuse the fact that bank personnel went into Clayton to go to a meeting. Contrary to the implication in the Bank's Brief, the trial judge, in the passage cited in part by the Bank, Bank Br. 26, ft. 19, only said it was obvious to him "as a spectator" that Mr. Hines was confused, but that it was a question for the jury, not the judge. Tr. 861, line 21 through 862, line7. The exchange was made in reference to Bianco's request to submit on punitive damages which was denied. Mr. Dillon for the Bank was the only one who admitted to being confused. Tr. 852, , lines 22-25.

meetings on the 7th, Mr. Jones felt there was a real possibility that the letters of credit would be called upon, so "I decided to go ahead and have the trucks come. Basically I figured they wouldn't get there until around noontime." (Tr. 740, line 20 through 741, line 9) At the beginning of the meeting on the 8th, Mr. Jones was inquiring of Mr. Bianco about the location of Mr. Bianco's pleasure boat. (Tr. 459)[22]

Early in October, shortly after the meeting on the 8th, Mr. Jones spoke with Ms. McFaul and explained to her that he was upset that the Bank was not involved in the negotiations with Messrs. Maurer and Fisher, and that they were not going to continue to do business with the Bank. (Tr. Vol. I, p. 39) Mr. Jones was worried that the money wouldn't flow into the Bank as it did when Mr. Bianco was the owner. (Tr. 39 - 40) Mr. Bianco verified that the Bank had expressed to him in September that the Bank did not want to sell to Messrs. Maurer and Fisher, and had said "Tom Maurer isn't cooperating with us." (Tr. 442- 443)

THE DAMAGE EVIDENCE

After these events, in 1998 the Bombardier lawsuit for deficiency in the floor plan financing (after return of goods by the Bank) was settled by a consent judgment in the amount of $230,000.00. (Tr. 462, Trial Exhibit 102) The dispute with Kawasaki for a

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[22] There is seemingly no reason for these actions other than an intent to gain possession of yet more collateral. It is inconsistent with an intent to stand still.

similar deficiency was resolved by Ms. Love advancing for JBKP another $25,098.63 in November and December of 1997. (Tr. 461, 641 - 644; Trial Exhibits 68, 70, 71 and 72) Ms. Love had previously loaned $50,000.00 ($25,000 of which occurred on October 6) which remained unpaid. (See, Footnote 11, above) Colonial Pacific who leased computer equipment to JBKP filed a lawsuit in the Circuit Court of St. Louis County, Missouri, Case No. 98CC-4013, of which the trial court took judicial notice, which resulted in a consent judgment for $44,748.74 to compensate for computers taken by the Bank and not returned which were covered by a security interest of Colonial Pacific. This occurred in 1999. (Tr. 462-463, 467, Trial Exhibit 104) In addition, Nations Bank Corporation, who financed customer purchases which JBKP had to guaranty, filed a lawsuit in the Circuit Court of St. Louis County, Missouri, Case No. 97CC-2371, of which the trial court took judicial notice, which resulted in a consent judgment in 1998 for $34,115.22, due to the loss of records confiscated by the Bank which prevented JBKP from pursuing the customers on unpaid amounts. (Tr. 464-465, Trial Exhibit 103) The loss of records and computers also prevented Mr. Bianco from establishing the actual amount owed to Bombardier and other creditors. (Tr. 596-597)

Mr. Bianco testified on both direct and cross examination that his goodwill in JBKP, which he lost when he lost the ability to sell the business in a sale which was to maintain the use of his name, was worth $400,000.00 to $500,000.00. (Tr. 468 - 469, 579-580) He testified that his personal reputation in the sports vehicle community was “annihilated” as a result of the events on October 6, 7 and 8, and was worth $400,000.00. (Tr. 469 - 470) As

of trial, Mr. Bianco had been unemployed on a full-time basis since he left the dealership. (Tr. 470)

In order to secure the $32,000.00 payment to Suzuki in September of 1997, as well as other funds advanced by Nevan Fisher to continue the business operation in September of 1997, Mr. Bianco provided an agreement to Mr. Fisher which included a Deed of Trust on his house in the amount of $58,750.00, which resulted in a foreclosure on the house on November 18, 1998, and a loss of $20,000.00 in equity. (Tr. 465 - 468, Trial Exhibits 105 and 106)

The Record as cited will note that all of the judgments, notes and foreclosures referred to in this Statement, Trial Exhibits 68, 70, 71, 72, 102, 103, 104, 105 and 106, as well as the evidence of goodwill and loss of reputation and employment, were admitted into evidence without any objection of any kind at any time from the Bank.

Mr. Feder in his deposition noted that the dealership then currently was owned by St. Louis Power Sports, a corporation created *after* the replevin, *not* by the proposed buyer as of October 6-8. 1997, Quest of Quietude. (LF 239-240) He also testified that the taking of the inventory made the transaction much more difficult. (LF 245)

Factual details of the timing of filing various pleadings in this case and the Replevin Case will be discussed in the Argument portion of this Brief, below.

POINTS RELIED ON

I. The trial court did not err in assuming jurisdiction over the Fraud Case because, assuming the Fraud Case is a compulsory counterclaim to the Replevin Case, which Bianco does not concede or assume, the issue cannot be raised as a "stealth defense," and the filing of the Replevin Case did not deprive the trial court of subject matter jurisdiction in the Fraud Case, in that it only implicates the issue of "primary" or "competency" jurisdiction, and did not deprive the trial court of authority to act. The opinions of the courts of appeal of this State holding that compulsory counterclaim is a matter of subject matter jurisdiction are contrary to and in conflict with the holding of this Court in 66, Inc. v. Crestwood Commons Redevelopment Corporation, 998 S.W.2d 32 (Mo.banc1999), and others, and should be reversed.

66, Inc. v. Crestwood Commons Redevelopment Corporation, 998 S.W.2d 32 (Mo.banc1999).

Black v. Sanders, 414 S.W.2d 241 (Mo.1967).

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 718 (Mo.banc 1979).

State ex rel. Lambert v. Flynn, 348 Mo. 525, 154 S.W.2d 52 (Mo.banc 1941).

Missouri Supreme Court Rule 55.08

Missouri Rule of Civil Procedure 55.32(a)

II. The trial court did not err in denying the Bank's two motions for directed verdict and subsequent post-trial motions because the fraud claim was not a

compulsory counterclaim in that it did not arise from the same transaction or occurrence as the Replevin Case.

Cantrell v. City of Caruthersville, 359 Mo. 282, 221 S.W.2d 471 (1949).

Jewish Hospital of St. Louis v. Gaertner, 655 S.W.2d 638 (Mo.App.E.D.1983).

Lowe v. First City Bank of Rutherford County, 1994 WL 570082, *3 (Tenn.Ct.App. 1994).

Ollison v. Village of Climax Springs, 916 S.W.2D 198 (Mo.banc1996).

III. The trial court did not err in denying the Bank's two motions for directed verdict and subsequent post trial motions because the evidence was replete with facts sufficient to support a verdict of fraudulent misrepresentation in that:

III a. . . . the representations were statements of present fact, not opinion, as construed in case law.

Botanicals on the Park, Inc. v. Microcode Corp., 7 S.W.3d 465 (Mo.App.E.D.1999).

Brown v. Hannibal Anesthesia Service, Inc., 972 S.W.2d 646 (Mo.App.E.D.1998).

Next Day Motor Freight, Inc. v. Hirst, 950 S.W.2d 676 (Mo.App. E.D.,1997).

Chesus v. Watts, 967 S.W.2d 97 (Mo.App.W.D.1998).

III b. . . . the representations were demonstrated to be false by the later actions of the Bank.

Botanicals on the Park, Inc. v. Microcode Corp., 7 S.W.3d 465 (Mo.App.E.D.1999)

III c. . . . the Bank knew the representations to be false at the time made, which is all that is required under case law.

Allison v. Mildred, 307 S.W.2d 447 (Mo.1957).

Botanicals on the Park, Inc. v. Microcode Corp., 7 S.W.3d 465 (Mo.App.E.D.1999).

Chesus v. Watts, 967 S.W.2d 97 (Mo.App.W.D.1998).

III d. . . . the Bank clearly intended all parties including respondents to act on the representations.

No Cases Cited.

III e. . . . the representations were material as shown by the evidence.

Constance v. B.B.C. Development, 25 S.W.3d 571 (Mo.App. W.D. 2000).

Chesus v. Watts, 967 S.W.2d 97 (Mo.App.W.D.1998).

Travelers Indemnity Co. v. Harris, 216 F.Supp. 420 (E.D.Mo.1961)**.**

III f. . . . the damages were quantifiable and were quantified in the evidence.

Dierkes v. Blue Cross and Blue Shield of Mo., 991 S.W.2d 662 (Mo. banc 1999)

Salmon v. Brookshire, 301 S.W.2d 48 (Mo.App.1957).

State ex rel Moore v. Morant, 266 S.W.2d 723 (Mo.App.E.D.1954)

III g. . . . the Bank failed to preserve its objection to any lack of evidence on any issue but knowledge of falsity at the time made.

Doe v. Alpha Therapeutic Corporation, 3 S.W.3d 404 (Mo.App.E.D. 1999).

Heins Implement Co. v. Missouri Highway & Transp. Comm'n., 859 S.W.2d 681 (Mo. banc 1993).

Senu-Oke v. Modern Moving Systems, Inc., 978 S.W.2D 426 (Mo.App.E.D. 1998).

Wolfe v. State ex rel. Missouri Highway and Transp. Com'n, 910 S.W.2d 294(Mo.App.W.D. 1995).

IV. The trial court did not err in overruling the Bank's objections to Instruction No. 7, and in denying post-trial motions because the Bank did not make any properly preserved objection to the instruction in that it did not make an objection prior to the giving of the instruction which was not corrected as requested by the trial court, and the instruction properly defines the law when read as a whole.

French v. Missouri Highway and Transp. Com'n, 908 S.W.2d 146 (Mo. App.W.D. 1995)

Metro Waste Systems, Inc. v. A.L.D. Services, Inc., 924 S.W.2d 335 (Mo.App.E.D.1996)

V. The trial court did not commit plain error giving Instruction No. 7 because the giving of said instruction did not result in manifest injustice or a miscarriage of justice in that:

a. it did not assume a disputed fact, nor was it confusing or misleading; and

b. any confusion created was compounded by the Bank giving a converse instruction using the exact same language, and therefore the Bank cannot be allowed to benefit from its own error.

Fowler v. Park Corporation, 673 S.W.2d 749 (Mo. banc 1984).

Roth v. Roth, 760 S.W.2d 616, 618 (Mo.App.E.D.1988).

Senu-Oke v. Modern Moving Systems, Inc., 978 S.W.2D 426 (Mo.App.E.D. 1998).

Washburn v. Grundy Elec. Co-op., 804 S.W.2d 424, 430 (Mo.App. W.D.1991).

ARGUMENT

I. The trial court did not err in assuming jurisdiction over the Fraud Case because, assuming the Fraud Case is a compulsory counterclaim to the Replevin Case, which Bianco does not concede or assume, the issue cannot be raised as a "stealth defense," and the filing of the Replevin Case did not deprive the trial court of subject matter jurisdiction in the Fraud Case, in that it only implicates the issue of "primary" or "competency" jurisdiction, and did not deprive the trial court of authority to act. The opinions of the courts of appeal of this State holding that compulsory counterclaim is a matter of subject matter jurisdiction are contrary to and in conflict with the holding of this Court in 66, Inc. v. Crestwood Commons Redevelopment Corporation, 998 S.W.2d 32 (Mo.banc1999), and others, and should be reversed.

STANDARD OF REVIEW:

Appellant states the correct standard of review.

ARGUMENT:

THE PROCEDURAL SUBTERFUGE AND STEALTH DEFENSE

The Bank has raised the issue of whether the trial court was precluded from hearing the fraud claim on the grounds that it lacked subject matter jurisdiction to do so, claiming the fraud claim was a compulsory counterclaim to the replevin claim.

It is essential that this Court understand the timeline of events leading up to this jury trial of four days and a jury verdict of $675,000.00 in favor of Bianco. Bianco has set out the timeline of events in great detail at the beginning of its Statement of Facts, above. What may be gleaned from the above recitation of the facts and of the pleadings filed is that the Bank knew of the existence of the Replevin Case, and knew that Bianco had not filed a response or entered an appearance in November of 1997. Yet the Bank did not raise the compulsory counterclaim argument when it filed an answer in February of 1998, at which time it knew there was an interlocutory order of default in the Replevin Case. It did not attempt to amend and raise the defense through three trial settings of the Fraud Case, a period of almost 16 months.[23]

The Bank did not reduce the interlocutory default taken in the Replevin Case until one year after it filed an answer in the Fraud Case for reasons unexplained anywhere in the record. It waited for six (6) months after the default, until the eve of the fourth trial setting, to file an amended answer and a motion to dismiss based upon collateral estoppel, res judicata and Missouri Rule of Civil Procedure 55.32(a)(compulsory counterclaim). It failed to have any court ruling placed on the record concerning its motion to dismiss, but had the case continued for the fourth time. It again failed to raise the compulsory

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[23] While it is not reflected in the record, Bianco did not request any of the continuances granted in the Fraud Case trial settings.

counterclaim defense by failing to raise it in the motions for directed verdict at the close of the plaintiffs' case and at the close of all of the evidence.

The Bank spends much time and energy in its Brief exploring the philosophy of why there is a compulsory counterclaim rule. Bianco believes that this is done in order to divert the Court's attention from the basic questions of what constitutes such a claim; when it may be asserted; and what is the proper method of challenging, and who's burden it is to challenge, a refusal of a trial court to recognize such a claim.

The Bank should not be allowed to sit on its claims and attack by stealth. Modern rules of procedure are specifically designed to prevent such actions. The defense of res judicata is an affirmative defense which must be pled or is waived. **Missouri Supreme Court Rule 55.08**; **Great American Acceptance Corp. v. Zwego** 902 S.W.2d 859, 863, (Mo.App. W.D. 1995); **Green v. City of St. Louis,** 870 S.W.2d 794, 797 (Mo.banc 1994).

> The facts that give rise to res judicata, by their very nature, are known to the defendant from the inception of a lawsuit. Accordingly, a defendant should not be able to hold preclusion in reserve as a "stealth defense" long after the time for raising substantive defenses has passed. *See Rule 55.27(f).*

Heins Implement Co. v. Missouri Highway & Transp. Com'n, 859 S.W.2d 681, 685 (Mo.banc 1993), (emphasis added). At some point in time a party should lose the right to raise such an issue which was clearly known to it at early stages of the proceeding. Green,

infra. By failing to properly object at trial and raise the claim in its motions for directed verdict, the Bank tried the Fraud Case by implied consent. Id.

While the effect of delay might not technically be referred to as "waiver" under some interpretations of Green, it matters not what it is called: it is simply no longer an issue in the case if not properly raised and preserved. This point need not be belabored, as the Bank seeks to do, for whatever it is called after Green, the effect is the same.

Green appropriately made much of the injustice or prejudice caused the opposing party if a belated request to raise defenses such as res judicata is granted. Green, 870 S.W.2d at 797. Here, as of trial almost two years after the petition was filed, and after a four day trial, the prejudice would be great. It must be remember that at the time of trial, the Replevin Case was up on appeal, and there was no guaranty of its proper reversal and the subsequent ability to plead. Hindsight does not benefit the court system or Bianco here, as the Bank would have it, it only serves the purposes of the Bank.[24]

Various cases have acknowledged directly or indirectly that compulsory counterclaim is an affirmative defense. See, **Stevinson v. Deffenbaugh Industries, Inc.**, 870 S.W.2d 851, 858 (Mo.App.W.D.1993). See, also, **Westoak Realty & Inv., Inc. v.**

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[24] The Replevin Case is currently stayed by the Court of Appeals for the Eastern District at the relation of the Bank pending the result of this case. Meramec Valley Bank vs. Weisman, ED 79637, June 13, 2001.

Hernandez,682 S.W.2d 120 (Mo.App. E.D. 1984). Bianco raised the issue of waiver of the affirmative defense here at the first instance it was raised. (See, Response, at L.F. 59)

The Bank relies on the case of **Rell v. Burlington Northern R. Co.**, 976 S.W.2d 518 (Mo.App.E.D.1998) for the proposition that compulsory counterclaim goes to subject matter jurisdiction and cannot be waived. It now cites for further support the cases of the Western and Southern Districts with similar holdings: **Evergreen Natl. Corp. v. Killian Construction Company**, 876 S.W.2d 633 (Mo.App.W.D.1994); **Choate v. Hicks**, 983 S.W.2d 611 (Mo.App.S.D. 1999). It should first be noted that the Bank never raised this issue as one of "subject matter jurisdiction" before the trial court. While it raised the defense of compulsory counterclaim to the trial court belatedly, it did not phrase it as a preclusive jurisdictional claim, nor is it properly one. Respondents respectfully suggest that the principle of Rell, Evergreen and Choate are simply bad law, incorrectly decided without analysis of any depth, and overruled *sub silentio* by the unanimous decision of this Court in the case of **66, Inc. v. Crestwood Commons Redevelopment Corporation**, 998 S.W.2d 32 (Mo.banc1999).

Rell, Evergreen and Choate are not only in conflict with 66, Inc., but are also in conflict with the cases of: **State ex rel. Industrial Properties, Inc. v. Weistein**, 306 S.W.2d 634 (Mo.App.E.D. 1957) and the cases upon which it relies; **Black v. Sanders**, 414 S.W.2d 241 (Mo.1967); **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 718 (Mo.banc 1979); and **Fine v. Waldman Mercantile**, 412 S.W.2d 549 (Mo.App.[E.D.] 1967).

In 66, Inc. v. Crestwood Commons, Crestwood Commons had filed a condemnation action against 66, Inc. over certain real estate on July 13, 1989. The trial court denied condemnation but this Court reversed in 1991. In July of 1992, Crestwood Commons abandoned the condemnation. In November of 1992, 66, Inc. filed an action seeking specific performance as a third party beneficiary of the contract between Crestwood Commons and the City of Crestwood. There was still a motion filed by 66, Inc. pending at the time in the condemnation action for interest due. In March of 1993, the second action was amended to add a count for abandonment of the condemnation action. Id., at 37. In August of 1994, the second action was amended a second time to remove the request for specific performance and seek damages from the abandonment of the confirmation proceeding. Id. In January of 1994, after 66, Inc. realized that the defendant was a shell, it filed an separate action against the owners of Crestwood Commons called a "guaranty" action. That "guaranty" action was dismissed with prejudice in August of 1994. Id., at 38. The second action remained pending throughout the pendency of the "guaranty" action. No motion was ever made to consolidate the actions. Id.. On May 19, 1995, res judicata was for the first time raised as an affirmative defense in the second action - the abandonment action. Id., at 43.

Crestwood Commons and its individual owners argued that the dismissal of the "guaranty" action barred any claim for damages in the abandonment action. The Supreme Court rejected the claim, holding that res judicata as an affirmative defense must be timely raised. Id., at 42. The Court went through the following reasoning:

> There are two unusual aspects of the res judicata defense asserted here. First, . . . the multiplicity of lawsuits in part is caused by the actions of the defendants Hycel and Schnuck and their alter ego, which seek to invoke the res judicata defense in the lawsuit that is the subject of this appeal. Second, 66, Inc.'s claim for damages was already pending when the "guaranty" action was instituted in the same circuit court. None of these defendants - - Crestwood Commons, Hycel, or Schnuck - - sought to consolidate this action with the "guaranty" action. **Thus if there was a splitting of a claim, these defendants acquiesced in it.**
>
> . . . Here the defendants had the opportunity to call to the trial court's attention the pendency of purportedly related claims. Had they done so, under Rule 66.01 the trial court could have consolidated the claims and avoided the multiplicity of litigation that these parties now protest by invoking res judicata.
>
> **Res judicata is not a "stealth defense" that can be held in reserve**, as this Court said in Heins, supra, 859 S.W.2d at 685.

Id., at 42-43 (emphasis added). This Court's ultimate reasoning was that: **"It would be unjust to allow Crestwood Commons to choose to defend both actions, wait until one of them went to judgment and then argue that it is res judicata to the other**." Id., at 43. This is exactly what the Bank is seeking to do in the case at bar.

The Supreme Court noted that "res judicata, also known as claim preclusion, is a judicially created doctrine to inhibit multiplicity of lawsuits." Id., at 42. The compulsory counterclaim rule, in turn, "is simply the codification of the principles of res judicata and collateral estoppel." **Beasley v. Mironuck**, 877 S.W.2d 653, 656 (Mo.App.E.D.1994). Thus if this Court has held that one can waive the defense of res judicata by attempting to use it as a stealth defense, and the compulsory counterclaim rule is a codification of the principle of res judicata, it is inescapable that the claim of compulsory counterclaim can be waived when it is attempted to be used as a stealth defense. It is inescapable that the principles of logic, found in the common syllogism: if a=b, and b=c, then a=c; applies here: If compulsory counterclaim is a codification of res judicata, and res judicata cannot be raised by stealth defense, then compulsory counterclaim cannot be raised by stealth defense.

It is undeniable that both theories, res judicata and compulsory counterclaim, are theories of issue preclusion. Issue preclusion is the same no matter what it is called. Why should there be one rule for one type of issue preclusion, and a different rule for another? The answer simply is that there should not. More importantly, why should one type of issue preclusion rise to the status of an immutable issue of subject matter jurisdiction, when the original concept does not rise to that rarified status? The answer simply is that it should not.

Here, the Bank could have raised the compulsory counterclaim defense as early as February of 1998, nineteen (19) months before it did. It could have moved at that time to

consolidate the Fraud Case with the Replevin Case. Instead, it chose to wait until the eve of the fourth trial setting, six (6) months after obtaining a judgment by default which was later overturned as an abuse of discretion, to raise the claim and attempt to benefit by the default judgment and its own inaction. It did not even feel strongly enough about its compulsory counterclaim argument between filing it in August and trying the case in November to seek a writ of prohibition from the appellate courts to stop the trial, its true and appropriate remedy if it was correct.

The Bank has acquiesced and impliedly consented to the trial of this Fraud Claim, which a jury has properly ruled upon. It would be grossly unjust to allow it to benefit by conflicting judicially created doctrine when this Court has distinctly said that such subterfuge should not be permitted.

The Bank would claim no penalty paid for its subterfuge, because the Replevin Case is still pending, and it is possible to raise the Fraud Claim in retrial in that case. (Bank Br. 52). The Bank, without citation, would place the burden of disproving a claim of compulsory counterclaim not on the party asserting it, as is the law, but on the party against whom it is raised. (Bank Br. 90) At another part of its Brief, the Bank admits delay in raising the compulsory counterclaim issue early on (Bank Br. 73). In contrast, the Bank fails to explain in practical terms when there was a time that Bianco knew the Replevin Case was still alive but a default was not in place, when it could have filed a counterclaim.[25]

[25] The Bank at this point of its Brief cites to the opinion of the Court of

The hypocrisy of this position is so overwhelming that it takes the breath away. The concept of issue preclusion, as stated in the cases above, is to avoid a multiplicity of litigation. It is usually raised where one case has been tried to completion, and the second is then found to be precluded. In this case, the first case was tried to conclusion not on the merits and only by the Bank obtaining a questionable default judgment, which has now been overturned on appeal. The second case has now been tried to completion. The Bank states that "the punitive nature of the Compulsory Counterclaim Rule does not have to fall on Bianco," if the Court reverses the judgment because the claim can be brought in the Replevin Case. (App. Br. 52) The Bank is apparently insensitive to the burden for the court, for the jury, for the trial counsel, and most especially emotionally for the litigants of trying a four day jury trial to completion. To be forced to try this case again would be nothing but punitive for all involved. The status of the Replevin Case in its present posture should be

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Appeals prior to transfer. The opinion of the court of appeals below is now after transfer of no precedential effect. **Carroll v. Loy-Lange Box Co.**, 829 S.W.2d 86, 90 (Mo.App.E.D.1992); **Garrett v. State Dept. of Public Health and Welfare**, 558 S.W.2d 679, 682 (Mo. App.[W.D.]1977). This case is now to be decided here as if it had originally been brought in this Court. **Board of Ed., Mt. Vernon Schools, Mt. Vernon v. Shank**, 542 S.W.2d 779, 780 (Mo.banc 1976). **Carroll v. Loy-Lange Box Co.**, 829 S.W.2d 86, 90 (Mo.App.E.D.1992)6

irrelevant to this Court in deciding this issue. Everyone will be punished by the Bank's actions and subterfuge if this case is tried again, including the Bank.

An analysis of the true meaning of subject matter jurisdiction will show why the position of the Bank and its reliance on Rell, Evergreen and Choate are incorrect.[26]

TYPES OF JURISDICTION

The term "'[j]urisdiction' is often used ambiguously." **Lake Wauwanoka, Inc. v. Spain**, 622 S.W.2d 309, 314 (Mo.App.E.D. 1981). This ambiguous, and often loose, application of the concept of jurisdiction lies at the heart of the problem with the Rell case, and cases with similar holdings.

The court of appeals succinctly analyzed the types of jurisdiction in the case of **State ex rel. Industrial Properties, Inc. v. Weistein**, 306 S.W.2d 634 (Mo.App.E.D. 1957). In that case, an original proceeding in prohibition, a corporation sought to prohibit the circuit court from proceeding in an action by a city to procure a judgment authorizing annexation of an unincorporated area. At the time of the city's lawsuit, two other lawsuits were pending by two other cities seeking annexation of the same property. *One was on*

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[26] The Bank asserts that Bianco raised the issue of "prior jurisdiction" only at the time of oral argument. (Bank Br. 60) This is because the Bank did not raise the issue of subject matter jurisdiction at any time until it filed its Reply Brief below, responding to Bianco's argument concerning 66, Inc. However, all of this rhetoric as to "who's on first" is now moot. See, Footnote 25, above.

appeal after having been decided in the trial court. Id., at 635-636. The issue before the court was the extent of the lower court's jurisdiction. The court found that the nature of the lower court's jurisdiction was one of "prior" rather than "subject matter" or "personal" jurisdiction, "prior" jurisdiction being jurisdiction to render a particular judgment in a particular case.

> It is also a well-recognized principle that in order for a court to possess jurisdiction to adjudicate, it must have jurisdiction of the subject matter, jurisdiction of the res or the parties, and **jurisdiction to render a particular judgment in a particular case**. Healer v. Kansas City Public Service Co., Mo.Sup., 251 S.W.2d 66, 70; State ex rel. Lambert v. Flynn, 348 Mo. 525, 154 S.W.2d 52, 57; Clark v. Clark, Mo.App., 300 S.W.2d 851, 852. . . . They [relators] predicate their contention that respondent is without jurisdiction *to proceed further* in cause No. 216795 (Olivette case) solely because of the existence of two wholly different declaratory judgment actions--the one instituted by the City of Creve Coeur and which was decided adversely to the city by the trial court, and the other initiated by the City of Overland in which the issues have not as yet been framed. It is said that because both of those cases were instituted prior to the Olivette action and encompass substantially the same land, that respondent is without jurisdiction to proceed to hear the Olivette case until both the Creve Coeur and Overland

actions have been finally adjudicated. **Thus it will be seen that relators are invoking and relying upon the doctrine of 'prior jurisdiction.'**

Id., at 636. The court then went on to analyze the effect of the first filed cases on the last filed case.

> Furthermore, it seems clear that relators are in reality basing their claim for prohibition upon failure of respondent to *stay or abate* proceedings in the Olivette action until the Creve Coeur and Overland cases have been finally litigated and fully determined. As this court said in State ex rel. Aetna Life Ins. Co. v. Knehans, Mo.App., 31 S.W.2d 226, 228: **'There is no doubt about the general rule that the pendency of a prior action or suit *for the same cause of action, between the same parties,* in a court of competent jurisdiction, will abate a later action or suit, either in the same court, or in another court of the same jurisdiction.' (Italics supplied.)** This is on the theory that whenever a suit upon a cause of action is instituted in a court of the proper jurisdiction, the cause of action is at once segregated and set apart from the general class to which it belongs, and is thereby withdrawn from the jurisdiction of other courts of coordinate jurisdiction. **In the same case it was held that prohibition is the proper and appropriate remedy to prohibit one court from entertaining a suit, the subject matter of which is in litigation in another court of concurrent and co-ordinate jurisdiction, and which has acquired jurisdiction both of the subject**

> **matter and the parties thereto.** However, to successfully invoke the plea of a prior suit pending, it must appear that the prior action is between the same parties, and that the causes of action and the issues involved are substantially the same, '* * * it must be made to appear that the relief sought in both instances is in all material respects the same, *so that a judgment in the first suit would necessarily be res adjudicata in the second*.' (Italics supplied.) State ex rel. Aetna Life Ins. Co. v. Knehans, supra, 31 S.W.2d loc. cit. 229. For reasons that are apparent the rule cannot be applied to the case before us.

Id., at 637-638 (emphasis added). The court concluded that it should not prohibit the third lawsuit from proceeding. While the fact situation distinguishes Industrial Properties from the case at bar, the general principles apply here and beg the jurisdictional question of just what type of jurisdiction are we really dealing with when examining the compulsory counterclaim rule.

In the first instance, in defining what occurs when a second action is filed for the same cause of action between the same parties, Industrial Properties clearly states that what is occurring is an abatement of the jurisdiction of the second court. If this is true, then the second court clearly has *subject matter jurisdiction* over the case, that jurisdiction is merely held in abeyance. What the second court lacks is *jurisdiction to render a*

particular judgment in the second case, or "prior" jurisdiction. The proper and appropriate remedy for this, Industrial Properties makes clear, is prohibition.[27]

In the second instance, to fully understand the import of this reasoning, it is instructive to look at one of the cases upon which Industrial Properties relied, this Court's **State ex rel. Lambert v. Flynn**, 348 Mo. 525, 154 S.W.2d 52 (Mo.banc 1941).

In Lambert, the Court addressed an original proceeding in prohibition to prohibit a circuit court from proceeding in a case brought by a policeman against the city retirement pension system. Relators argued that the circuit court lacked jurisdiction because of a hearing pending before the administrative body on the same claim which the circuit court had quashed. Id., at 527. The respondent circuit court claimed that relators had waived the jurisdictional question by appearing in the circuit court and filing an answer. The court disagreed, and analyzed the situation as follows:

> **It is said that the jurisdiction of a court to adjudicate a controversy rests on three essentials**: (1) jurisdiction of the subject matter; (2) jurisdiction of the res or the parties; (3) and jurisdiction to render the particular judgment in the particular case. Charles v. White, 214 Mo. 187, 206, 208, 112 S.W. 545, 549, 21 L.R.A.,N.S., 481, 127 Am.St.Rep. 674. The first two are the grand subdivisions of jurisdiction. Jurisdiction of the subject

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[27] In the instant case, the Bank never sought prohibition. See, discussion below, addressing this failure of the Bank to file for prohibition.

> matter is derived from the law and cannot be conferred by consent. Jurisdiction over the person may be waived because it is a personal privilege.
>
> But **the third essential**, jurisdiction to render the particular judgment in the particular case (**sometimes called 'competency**'), partakes of the character of one or the other of the first two. **Where the lacking element of jurisdiction goes to the personal privilege of the litigant, it may be waived.** But when it depends on the power of the court under a public policy established by statute or otherwise, it cannot be waived. It is said in 21 C.J.S., Courts, § 85, pp. 128, 129: 'If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard.' In the instant case respondent's court had no power to try the case until statutory conditions had been complied with and administrative remedies had been exhausted, and also unless these facts were shown by the petition upon which respondent's jurisdiction was invoked. It partook of jurisdiction of the subject matter and could not be waived by mere appearance of the relators.

Id., at 532-533 (emphasis added).

Here, contrary to the situation in Lambert, while the compulsory counterclaim rule has been established by both rule and statute, it is a rule of personal privilege of the litigant

to proceed, not a rule of the court concerning its power over the general subject matter. This Court has defined the compulsory counterclaim rule as one which is procedural in nature. In a case discussing the ability to join an uninsured motorist claim with a tort claim for negligence in an automobile accident, the Court held:

> Oates's failure to assert a compulsory counterclaim **constitutes a procedural waiver** of the claim under Rule 55.32(a). **The compulsory counterclaim rule is not a substantive limitation** and therefore the holding of Crenshaw, supra, is inapplicable. The elements required under Reese, supra, to constitute legal entitlement to recover are not affected by the failure of Oates to assert a counterclaim in the Iron County suit because Oates may show causal negligence, the lack of contributory negligence, and resulting damage in the separate and distinct suit under the uninsured motorist clause regardless of the procedural waiver of his rights against Coad.
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> . . .
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> Therefore, the failure of Oates to assert his counterclaim does not preclude him from being "legally entitled to recover" because **the compulsory counterclaim rule creates a procedural bar only.**

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 718 (Mo.banc 1979). (emphasis added). Logically, if the compulsory counterclaim rule is not substantive in nature, but merely a procedural bar, then it would fall more appropriately into that category of prior or

competency jurisdiction which can be waived. The procedural bar partakes of the character of jurisdiction over the parties, which can be waived, depending on the action of the parties and not the power of the court, as suggested in Lambert, supra.

This can be seen by reference to the case of **State ex rel. Furstenfeld v. Nixon**, 133 S.W. 340 (Mo. 1910). In that case, this Court addressed the following hypothetical situation to define the three kinds of jurisdiction:

> Unless the law gives the court jurisdiction of the subject, jurisdiction cannot be acquired by the consent of the parties, but, if the law gives jurisdiction of the subject, the court may acquire jurisdiction of the parties by their consent. If A. and B. both reside in this state and A. should sue B. for a debt in the circuit court of a county in which neither resides, and the writ is served on B. In that county, the court would have jurisdiction of the subject--that is, jurisdiction of subjects of that character--but it would not have jurisdiction of that case by virtue of the service of the process. But if B., without challenging the jurisdiction of the court should file his answer pleading to the merits, neither party could afterwards question the jurisdiction of the court because by their actions they are conclusively presumed to have consented to give the court jurisdiction of their persons--that is, their personal rights--in that case.

Id., at 342.

The circuit court clearly had jurisdiction over the subject matter of the fraud action here. There was no prerequisite to filing such an action. No jurisdictional exhaustion or other requirement existed. The trial court was competent to enter the particular judgment in this particular case. The Bank in the case at bar should be presumed to have consented to give the court jurisdiction over its person, that is its personal rights, by entering its appearance and not raising the issue of compulsory counterclaim for eighteen months after it filed its answer in the fraud case, and not until six months after it had obtained its default and the default was pending on appeal. This should be the end of the discussion.

THE HISTORY OF THE COMPULSORY COUNTERCLAIM RULE
AND ITS JURISDICTIONAL UNDERPINNINGS

The Court should not be sidetracked by the Bank's incorrect claim that the compulsory counterclaim rule is a creature of statute while the res judicata rule is court made. (Bank Br. 79) History makes clear that the compulsory counterclaim rule is based upon this federal rule and not a creation of the Legislature out of whole cloth. The compulsory counterclaim rule is a lineal descendant of Federal Equity Rule 30 and of American statutes going back to 1875. **State ex rel. Farmers Ins. Co., Inc. v. Murphy**, 518 S.W.2d 655, 660 (Mo.banc 1975). This predates the Missouri statute enacted L.1943, p. 353, § 73; R.S.A. Section 847.73; §509.420 RSMo (2000). Conversely, the legislature simultaneously sanctioned the rule of res judicata by statute in the codification of the rule allowing certain affirmative defenses to be raised. L. 1943, p. 353, §40; R.S.A. Section

847.40; §509.090. Attempts to elevate one rule above another by statutory authorization are of no avail.

Our courts have previously called the compulsory counterclaim rule "a form of 'claim preclusion by rule,'" **Elam v. City of St. Ann**, 784 S.W.2d 330, 333 - 334 (Mo.App.E.D.1990); debunking any myth that the rule has any special status by being codified.[28]

The compulsory counterclaim rule was enacted as a means of bringing all logically related claims into a single litigation through the penalty of precluding the later assertion of omitted claims, even though the rule does not, in express terms, provide a penalty for lack of compliance. **Landers v. Smith**, 379 S.W.2d 884, 886 (Mo.App.[S.D.]1964). However, "the nature and extent of the bar interposed by compulsory counterclaim statutes is the subject of divergent views, or at least considerable semantic confusion." Id., at 887.[29] In the Landers case however, the Springfield Court of Appeals clearly held that the rule is interpreted in Missouri as a **waiver** of an unasserted claim. Id.[30] While dicta and various

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[28] Granted in Elam the court found that the res judicata and compulsory counterclaim "are neither identical nor mutually exclusive," the court disposed of the matter at hand simply by addressing the res judicata issue, finding that such analysis removed any need to address the compulsory counterclaim issue. Id.

[29] Citing in Footnote 4: Wright, op. cit., 39 Iowa L.R. at 260-63, id. at 269-286; 1A Barron & Holtzoff, Fed. Practice & Proc., § 394.1, pp. 584-87 (Rules Ed. 1960).

[30] Citing at Footnote 5: State ex rel. Fawkes v. Bland, supra, 357 Mo. at 640,

interpretations of Green, supra., suggest continuing divergent views, the confusion does not create any significant difference between the compulsory counterclaim rule and the rule of res adjudicata. If the ability to bring the claim is one that can be waived, then logically the ability of the opposing party to assert the waiver is a personal right and not a question of the inherent power of the court.

This latter conclusion is in fact supported by the result of the Landers case, where that court held that: "In our view, the bar of the compulsory counterclaim rule does not become complete, nor is the counterclaim wholly foreclosed, until the action proceeds to judgment." Landers, 379 S.W.2d at 888. The result in Landers was that a dismissal of a claim in the second action by summary judgment based upon the fact that the claim was a compulsory counterclaim in the first, should be reversed, and the claimant should be allowed to proceed with his claim.

The reasoning found in this Court's case of **Black v. Sanders**, 414 S.W.2d 241 (Mo.1967) also supports the conclusion that the compulsory counterclaim rule is one in

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210 S.W.2d at 33, '* * * If he deliberately fails to do so [assert his compulsory counterclaim] he waives such claim'; State ex rel. Mack v. Scott, supra, 235 S.W.2d at 111, '* * * A party failing to set up * * * any related claims * * * waives the claims'; see Hyde & Douglas, The Civil Code Act of 1943, 2 Carr Mo.Civ.Proc. 551 '* * * A party who disregards this requirement will no doubt be held to waive his counterclaim.'

which the issue of jurisdiction is not absolute, and that a close analysis of the facts is necessary to determine whether the prior jurisdiction bars assertion of the claim in a later action. In that case, where the parties settled the first suit by dismissal and a compulsory counterclaim had not been filed, the Court found that the rule should not be applied.

> It does not appear that the force of the compulsory counterclaim rule should apply here. There is no indication in this record that appellant deliberately waived filing a counterclaim in the Hayden suit. The court in that case, up to the time of the settlement and dismissal, had the discretionary power to permit the appellant, by amendment, to file a counterclaim. Rule 13(f) Federal Rules of Civil Procedure; see also Civil Rule 55.48, V.A.M.R. The case was settled and dismissed without a trial on the merits. Appellant was represented in the case by an attorney employed by his insurer who settled the case on a release specifically protesting and denying liability on behalf of appellant and such settlement and dismissal was obtained without appellant's knowledge or consent and was not thereafter ratified by him. **It does not appear under such circumstances that the failure to file a counterclaim by appellant prior to such settlement and dismissal of Hayden's claim should act as a bar to any assertion of liability appellant might make against Hayden**. See the rule previously cited in Pierson v. Allen, supra, 409 S.W.2d l.c. 129; Portell v. Pevely Dairy Co., supra, 388 S.W.2d l.c. 792; Kirtley v. Irey, supra, 375 S.W.2d l.c. 134.

. . .

> Under the circumstances presented in this case and the authorities quoted, appellant should not be barred from asserting his claim against respondent by a proper compromise of the employee Hayden's claim which reserved to appellant his right to pursue his claim against this respondent. The trial court erred in sustaining respondent's motion for summary judgment.

Black v. Sanders, 414 S.W.2d 241, 244 - 245 (Mo.1967).

In Black v. Sanders it is clear that this Court felt that the claim could have been a compulsory counterclaim in the first suit, and that the trial court in the first case could have allowed an amendment to the pleadings so as to assert the claim. However, the case was not tried on the merits and was concluded without the claimant's knowledge. In that case, the court found that the compulsory counterclaim rule should not be applied, and the claimant should not be barred from pursuing his claim. It is clear the Court did not treat the matter as one of subject matter jurisdiction barring the claim, but rather found that the parties by their conduct waived the issue of competency jurisdiction, or simply failed to make it an issue, without expressly using that jurisdictional term.

Similarly here, a default was taken in the first case and subsequently has been reversed. The default was taken without Bianco's knowledge. In fact, due to the Bank's conduct in delaying filing the return of service, Bianco's counsel honestly believed Mr.

Bianco had not been served.[31] There was no trial on the merits, and now after reversal, the Replevin Case is still pending. Between the time the default judgment was entered by the trial court in the Replevin Case, and the time the Replevin Case was reversed on appeal, the fraud case had been tried to conclusion. During that same time there was no opportunity for Bianco to raise the fraud claim as a compulsory counterclaim in the Replevin Case. But to reverse the jury verdict in this four day fraud trial to retry the case in the now reversed Replevin Case, as the Bank suggests, would not serve any principle upon which the compulsory counterclaim rule is based:

> The general purpose motivating the Legislature in adopting said section was to avoid circuity of action, unnecessary delay, and unnecessary costs as well as to do away with confusion and uncertainty in reaching final conclusions in adjudicating the rights of parties in our courts.

Brinkmann v. Common School Dist. No. 27 of Gasconade County, 238 S.W.2d 1, 4 (Mo.App.[E.D.]1951). The Bank's deleterious conduct should not be sanctioned, for it has resulted in promoting circuity of action, unnecessary delay, confusion, uncertainty and extraordinary cost. It is clear that the Black v. Sanders court felt compulsory counterclaim was an issue which could be waived by the parties conduct, and therefore fell into that category of prior or competency jurisdiction which can, in the appropriate circumstance, be

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[31] Interestingly, even the Bank describes this belated filing as "elusive." Bank Br. 51, ft. 23.

waived. Waiver should be applied here to avoid a result opposite of the rule's intended goal.

PROPER APPROACH TO THE COMPULSORY COUNTERCLAIM RULE

The Bank argues that Bianco is the party who should have sought relief from this Court by prohibition prior to the fraud case being tried (Bank Br. 90), but this is semantic sophistry. It is the Bank who claims the trial court was without jurisdiction, not Bianco. Bianco believed then and believes now that the trial court had jurisdiction. It had no cause to seek relief from appellate courts before proceeding, even in light of the Bank's belated attempt to raise the issue. The Bank, as proponent of the jurisdictional infirmity argument, had the obligation to pursue it if it felt justified. It is not Bianco's fault the Bank did not. However, Industrial Properties, supra., finds that the appropriate remedy to challenge the issue is the filing of a writ of prohibition to prohibit the one court from proceeding if another court has concurrent or co-ordinate jurisdiction. This is how the matter arose in the cases cited by the Bank. Cf., **Jewish Hospital of St. Louis v. Gartner**, 655 S.W.2d 638 (Mo.App.E.D. 1993); Bank Br. 65. It was the Bank's burden to seek prohibition. It would be absurd to suggest that a plaintiff would seek prohibition to prohibit a trial court from proceeding in a case it sought to prosecute, when it is the defendant who is claiming bar by compulsory counterclaim and issue preclusion.

This is a clearly a question of competency jurisdiction which can be waived. In **Fine v. Waldman Mercantile**, 412 S.W.2d 549 (Mo.App.[E.D.] 1967), the court held that failure to preserve proof in the record of the prior action prevented the compulsory

counterclaim rule from being applied. This Court held that the trial court did not have authority to dismiss a petition on the grounds of compulsory counterclaim until the record reflected that there was unassailable proof that there was a prior action pending that would bring the plaintiffs within the scope of the compulsory counterclaim rule. Id., at 552. This result in Fine is directly contrary to the Bank's theory that the court can look outside of the record and determine its jurisdiction as is required under the scope of review to determine subject matter jurisdiction, but is compatible with the theory that this is a matter of competency jurisdiction which can be waived if not properly and timely asserted.

Bianco's discussion here of the various kinds of jurisdiction and its assertion that compulsory counterclaim goes to an issue of competency jurisdiction0 is not a strategic one based on a desire for forum shopping or an attempt to take the reins of a case by being plaintiff rather than defendant, as the Bank would suggest. (Bank Br. 89-90) Such arguments are inapposite to the facts of the case. Rules concerning change of judge obviate any need to forum shop by filing a separate case. Bianco filed its case in the same judicial circuit as the Replevin Case, putting to rest any such claim. The shopping here is being done by the Bank, who voluntarily consented to trying the Fraud Case without seeking prohibition, did not like the result, and now wants a new day in court. Its days however, should be numbered.

The issue is raised here because the law is now tortured and confused by lower courts of appeal paying too little attention to the history of the law and seeking quick remedies and solutions to complex jurisdictional questions. The "grand divisions of

jurisdiction" are known to all, as suggested in Lambert, supra., but this does not mean that "third essential," competency jurisdiction, is any less meaningful or important to the jurisdictional jurisprudence about which this Court must continually educate and clarify.

Assuming that this Court does find that the facts of the Fraud Case arose out of the same transaction or occurrence as the Replevin Case, the Court should find that the Bank waived its right to raise the defense of compulsory counterclaim by its deliberate delay, and should harmonize 66, Inc., Black, Oates and Nixon with Rell, Evergreen and Choate by reversing Rell, Evergreen and Choate to the extent that they hold the a compulsory counterclaim is a matter of subject matter jurisdiction. Having done so, this Court should affirm the jury verdict in the case at bar.

II. The trial court did not err in denying the Bank's two motions for directed verdict and subsequent post-trial motions because the fraud claim was not a compulsory counterclaim in that it did not arise from the same transaction or occurrence as the Replevin Case.

STANDARD OF REVIEW

The Appellant states the correct standard of review.

ARGUMENT

Appellant has raised the issue of whether the Fraud Claim was a compulsory counterclaim to the Replevin Case. Respondents respectfully suggest that it was not. The Replevin Case, *prior to remand*, was a four count case. Count I was a suit on the note known in this case as the "SBA Note." Count II was a replevin action for the property covered by a security agreement for the SBA Note. Count III was a suit on a note known in this case as the "Ski Nautique Note." Count IV was a replevin action for the property covered by a security agreement for the Ski Nautique Note. **Meramec Valley Bank v. Joel Bianco Kawasaki Plus, Inc**., 14 S.W.3d 684, 686 (Mo.App.E.D. 2000) ("Meramec I"). The Replevin Case, *as filed at the time in question*, did not deal with either the Bombardier Letter of Credit or the Polaris Letter of Credit. The Bank admits this at pages 44 and 47 of its Brief. It did not deal with the sale of the business in any manner. It did not deal with the agreements made on October 6, 1997, after the replevin was filed. All of these were the basis of the Fraud Case as pled and as presented to the jury. Since the facts underlying the Fraud Case did not arise out of the same transaction or occurrence which was the subject matter of the Replevin Case, the Fraud Case was not a compulsory counterclaim in the Replevin Case.

Similar cases have found this not to be a situation of a compulsory counterclaim. The thing sued for is not identical to or related to the thing sued for in the first case. The subject matter of this case was whether there was a representation made upon which Bianco relied which induced Bianco to suffer damage. The subject matter of the first case was

whether there was a default on two notes which warranted the court ordering a replevin. If the subject matter is not the same, there is no application of the compulsory counterclaim rule. **Ollison v. Village of Climax Springs**, 916 S.W.2D 198, 201-202 (Mo.banc1996).

In **McPheeters v. Community Federal Sav. and Loan Ass'n,** 736 S.W.2d 62, (Mo.App.E.D. 1987), the court distinguished between claims brought on an insurance policy in the first action for property loss due to fire, and claims brought in the second action for default on notes held by the insurance company by virtue of assignment *under the same insurance policy's mortgage clause*. It was held that the second action was not compulsory to the first. Id., at 64.

The only connection between the claims here is that the parties are the same. The notes are different to the extent the two letters of credit are not involved in the original case. The crux of the claims at bar really relate to a fraud perpetrated in reference to unrelated contracts, those of the manufacturers and the buyer, and to an agreement not to interfere with those contracts.

If one believes that the claims are related, it can be argued that it was not possible to bring these claims in the Replevin Case. In **J.C. Jones and Co. v. Doughty**, 760 S.W.2D 150, 160 (Mo.App. 1988), the court suggests that a claim for wrongful attachment is a separate action which cannot be asserted as a counterclaim in the attachment proceeding. In that case, the court held that a person injured by reason of a wrongful attachment is not limited to proceeding on the bond, but may ignore his remedy on the bond, which must be raised in the attachment suit, and sue in tort for actual damages. In the event the elements of

malice and want of probable cause were present in the procurement of the attachment, in addition to the facts underlying an action for simple wrongful attachment, an action for malicious wrongful attachment will lie. However, the court reasoned that one must wait until the attachment lawsuit is concluded to determine whether there is a cause of action. Id., at 158; citing **Talbott v. Great Western Plaster Co.**, 151 Mo.App. 538, 132 S.W. 15, 16 (1910); **Fry v. Estes**, 52 Mo.App. 1 (1892). Similar logic would apply here if one believed the claims related.

Bianco is cognizant of the traditional analysis of the compulsory counterclaim rule, and the general principle that "transaction" is to be applied in the broadest sense. **Stevinson v. Deffenbaugh Industries, Inc.**, 870 S.W.2d 851, 857 (Mo.App.W.D.1993). However, even in such an analysis of whether the two claims arise out of the same transaction, the courts have held that a significant factor is whether the facts supporting the second claim would also support a defense to the first claim. Id., citing **Jewish Hospital of St. Louis v. Gaertner**, 655 S.W.2d 638, 640 (Mo.App.E.D.1983) and **Cantrell v. City of Caruthersville**, 359 Mo. 282, 221 S.W.2d 471, 477 (1949). Under such an analysis with the present facts, the fraud allegations would not be a defense to a suit on a note in the Replevin Case in any manner, and therefore would not be considered the same transaction. The fraud claimed was not in the procurement of the SBA Note or the Ski Nautique Note, the subject matter of the Replevin Case, the fraud claimed was in the procurement of funds to allow a sale to go through to a buyer, and manufacturers to be paid, without interference by the Bank.

In a case similar to the case at bar, the Tennessee Court of Appeals reviewed its rule on compulsory counterclaims and found the rule to be similar to the Missouri rule.

> Tenn. R. Civ. P. 13.01 [FN5] promotes the efficient and expeditious determination of all issues in a single proceeding and discourages needless litigation. Clements v. Austin, 673 S.W.2d 867, 869 (Tenn. Ct.App.1983); Quelette v. Whittemore, 627 S.W.2d 681, 682 (Tenn. Ct.App.1981). It embodies principles similar to those embodied in the res judicata doctrine, Beasley v. Mironuck, 877 S.W.2d 653, 656 (Mo. Ct.App.1994) (discussing analogous Missouri counterclaim rule), and it operates in a similar manner. Ryder Truck Rental, Inc. v. Phipps, 213 Tenn. 465, 471-72, 374 S.W.2d 402, 405 (1963) (discussing Fed.R.Civ.P. 13(a)).

Lowe v. First City Bank of Rutherford County, 1994 WL 570082, *3 (Tenn.Ct.App. 1994). That court went on to analyze the case before it and found that the claim of plaintiffs' concerning an abuse of legal process in which the bank sued on a note was not a compulsory counterclaim in a prior suit by the bank on the note.

> The bank's suit was on Mr. Lowe's March 1988 note and Mrs. Lowe's guarantee. The Lowes' claim related to the legal process employed by the bank when it filed suit in July 1988. These claims embody different causes of action, involve different issues of law and fact, and require different proof.

Id., at *4. As a result, the Lowes' claim concerning the bank's liens lis pendens was not a compulsory counterclaim under Tennessee law. Respondents respectfully suggest that it is

not possible to distinguish that case from the case at bar, and the same result should be found here.

The Bank's analogy to Myers v. Clayco State Bank, 687 S.W.2d 256 (Mo.App.W.D. 1985) is misplaced. In that case, the guarantors claimed fraud in delaying filing suit on the notes which led the guarantors to believe no action would be taken on the very same notes. Id. At 259. Here the fraud is not related to any claim concerning the SBA Note or the Ski Nautique Note, the subject matter of the Replevin Case, but to promises to allow a sale of the business to be consummated. The Bank wants to focus only on the replevin itself, but its fraudulent acts encompassed much more. (See Point IV, below).

It is also important to note that the reliance on the definition of when an action accrues found in Heins Implement Co. v. Missouri Highway and Transportation Comm., 859 S.W.2d 681 (Mo. 1993) is inapplicable. The earliest the damage in this case was capable of ascertainment was after Bombardier, Kawasaki and others had their inventory returned, February of 1998. This was months after a responsive pleading would have been due if Bianco had been aware of the service. The pleading would have been due November 3, 1997.

The Bank wants to believe that Bianco admitted that the claim was compulsory in Meramec I. (Bank Br. 48-49) Unfortunately, the decision of the Court of Appeals does not support this contention. What Bianco claimed in Meramec I was that the Bank waived its right to assert the compulsory counterclaim by not raising it as a defense in the Fraud Case. Whether the Fraud Case was a compulsory counterclaim to the Replevin Case was

not an issue presented or decided in Meramec I. What is found in Meramec I is the following:

> On February 18, 1998, bank filed its answer to the fraud action, . . . Bank did not contend that this action constituted a compulsory counterclaim to the replevin action.

Meramec I, 14 S.W.3d at 687.

> In their first point, defendants contend that . . . (3) by affirmatively pleading a breach of the promissory notes and security agreements in the subsequent fraud action and by not raising as a defense that the action should have been brought as a compulsory counterclaim in the replevin action, bank waived or is estopped from pursuing further the replevin action;

Meramec I, 14 S,W,3d at 688.

> Further, defendants (Respondents here) later filed a separate action arising out of the transaction or occurrence pled in the notes and replevin action. Plaintiff (Bank) filed its answer to defendant's petition but did not allege that defendant's claims should have been pled as compulsory counterclaims in the initial action on the notes and replevin, pursuant to Rule 55.32(a).

Meramec I, 14 S.W.3d at 689. All of this language is clearly dicta, but even the passage concerning Bianco's contentions on that appeal do not admit that the claim was compulsory, but that the Bank waived the right to assert it by not raising that issue. This is

entirely consistent with Bianco's position here in this case. The Bank's position is hardly a logical interpretation of this Court's action, or any admission by Bianco. It is more logically another proof that even the Bank did not consider this a compulsory counterclaim until it feared actually trying the Fraud Case. More to the point, it is clear that whether the Fraud Claim arose out of the same transaction or occurrence is not a matter which was presented to and decided by the Meramec I court, and of no help to the issue at bar here.

The Bank is now adopting a position which it did not believe had merit for over nineteen months during litigation. It merely seeks to avoid liability for its egregious conduct now that it has been held to account. It resorts to sarcasm inappropriate to a claim of this serious nature, and wants to portray Bianco as playing on the "candlelight and soft music" of this Court's hear-strings, attempting to play the sympathy card in reverse. (Bank Br. 46-47) The distraction is not worthy of this Court's time. If the Bank had truly thought all of the claims were related, it would have said so much earlier in the proceeding. The Court should not be misled by the attempt, and should find that the Fraud Claim was not a compulsory counterclaim to the Replevin Case.

III. The trial court did not err in denying the Bank's two motions for directed verdict and subsequent post trial motions because the evidence was replete with facts sufficient to support a verdict of fraudulent misrepresentation in that:

III a. the representations were statements of present fact, not opinion, as construed in case law.

III b. the representations were demonstrated to be false by the later actions of the Bank.

III c. the Bank knew the representations to be false at the time made, which is all that is required under case law.

III d. the Bank clearly intended all parties including respondents to act on the representations.

III e. the representations were material as shown by the evidence.

III f. the damages were quantifiable and were quantified in the evidence.

III g. the Bank failed to preserve its objection to any lack of evidence on any issue but knowledge of falsity at the time made.

STANDARD OF REVIEW

In reviewing the denial of a motion for directed verdict, we view the evidence and all reasonable inferences therefrom in the light most favorable to the jury's verdict, disregarding all evidence and inferences to the contrary.

Skinner v. Thomas, 982 S.W.2d 698, 699 (Mo.App. E.D.1998). A jury verdict will not be overturned unless there is a complete absence of probative facts to support the verdict. Id.

Botanicals on the Park, Inc. v. Microcode Corp., 7 S.W.3d 465, 467-468 (Mo.App.E.D.1999).

> . . . to make a submissible case for fraudulent misrepresentation, substantial evidence is required for each fact essential to liability. Blanke v. Hendrickson, 944 S.W.2d 943, 944 (Mo.App. E.D.1997). Substantial evidence is evidence which, if true, has probative force upon the issues and from which the trier of facts can reasonably decide a case. Id. The questions of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law. Id.

Id., at 468.

ARGUMENT

III a. the representations were statements of present fact, not opinion, as construed in case law.

In reviewing the argument of the Bank that Bianco did not prove fraudulent misrepresentation (Bank Br. 93-123, Point II), it must first be emphasized that all of the evidence and inferences contrary to Bianco's theory should be disregarded. Botanicals on the Park, supra. Since the Bank only recited that part of the evidence which supported its

position, Bianco contends that on the face of its Brief the Bank's argument fails. The theory cited by the Bank in **Blanke v. Hendrickson**, 944 S.W.2d 943, 944 (Mo.App.E.D.1997) concerning a claim which solely depends on evidence which supports two inconsistent and contradictory factual inferences (Bank Br. 94) presumes that both parties are relying on one set of facts which is subject to two interpretations. What we have here, however, are two sets of facts which do not individually admit to multiple interpretations. Clearly the jury believed the one the Bank chose to ignore.

The Bank asserts that the representations were ones of opinion, not fact. This misstates the representations. The Bank refers to the jury Instruction 7, which asks the jury to find that the Bank represented that it would: (a) not demand further additional collateral; (b) allow the parties to meet with the manufacturers and the proposed buyer to complete the sale of the business; (c) stop the replevin and taking of plaintiff Joel Bianco Kawasaki Plus, Inc.'s inventory if the meetings on October 7 and 8, 1997 occurred and the negotiations for the sale of the business proceeded in good faith; (d) attend the meetings and make a substantial effort to resolve the sale of the business; and (e) not recommence the replevin and taking of the inventory without advising plaintiff Joel Bianco that a resolution cannot be achieved and the defendant was going to continue the replevin and taking. (LF 90) Missouri Approved Instruction (MAI) 23.05, which Bianco was using, requires that the drafter describe the act upon which defendant wanted plaintiff to rely, it does not require that the drafter state each fact which supports the representation. However, these allegations as found in the instruction are fact.

a) not demand further additional collateral. This is no opinion. The Bank either represented that it would not demand additional collateral or it would. Within twenty-four hours, it was demanding $104,000.00 in additional collateral.

That the representation was made is shown by the evidence. Mr. Jones admitted that the agreement, Trial Exhibit 36, was not complete and that it did not specify what the "resolution" was to be or what additional security Mr. Bianco was providing. It was clearly not an integrated agreement. Trial Exhibit 36 actually states that the Bank will do the things promised in that document "in exchange for providing this additional security." Implied in that language is that no additional security will be demanded. It is therefore more plausible that the Bank agreed that it would not demand any additional collateral as an inducement to get Mr. Bianco to post the additional collateral. It is an issue for the jury as to whether Mr. Bianco's testimony, and the express language of Trial Exhibit 36 is to be believed.

(b) allow the parties to meet with the manufacturers and the proposed buyer to complete the sale of the business. This is also a statement of fact. The Bank either allowed the parties to meet to complete the sale or took some action to prevent that. There is no opinion here.

(c) stop the replevin and taking of plaintiff Joel Bianco Kawasaki Plus, Inc.'s inventory if the meetings on October 7 and 8, 1997 occurred and the negotiations for the sale of the business proceeded in good faith. Again, a concrete action was represented: stop the replevin and taking of JBKP's inventory. The replevin stopped until

the Bank, a concrete act. The question becomes: for how long did it intend to stop at the time it promised to do so?

(d) attend the meetings and make a substantial effort to resolve the sale of the business. Again, a concrete action is required, no opinion. Did the Bank attend the meetings? Yes. Did the Bank make a substantial effort? No.

Contrary to the position of The Bank however (Bank Br. 97), what the Bank intended to convey by this statement of "substantial effort" was well documented in the evidence. Mr. Bossi, who was one of the parties receiving the Bank's representation as found in Trial Exhibit 35 (App. A-001), found that he understood it to mean that the Bank was changing its position from wanting to be paid in full. (Tr. 629, line 17 through 630, line 3) Mr. Jones, the Bank Vice-President and owner, stated that he intended Trial Exhibit 35, which included the statement of making a substantial effort, to be a statement of the Bank and accepted as "what the bank was prepared to do." (Tr. 302, lines 14 - 21) Finally, one can examine the later statements of the author of Trial Exhibit 35, Mr. Kopsky, who admitted that "I made a commitment that the bank was willing to do what I consider its share to compromise the matter. . . . My understanding was there would be some financial commitment by the bank; yes sir." (Tr. 834, lines 1 through 9) The trial court also found the term "substantial effort" to be unambiguous and not requiring explanation. Tr. 606-607. **It is inescapable that the "substantial effort" representation was a concrete, factual representation upon which the Bank intended the recipients, including Respondents through their counsel, to rely.**

(e) not recommence the replevin and taking of the inventory without advising plaintiff Joel Bianco that a resolution cannot be achieved and the defendant was going to continue the replevin and taking. This again is a concrete act. One may determine whether the replevin was recommenced or not, prior to advising Joel Bianco that "a resolution cannot be achieved and the Bank was going to recommence the replevin." The evidence from everyone except the Bank's officer and the Bank's attorney who attended the meeting was that the replevin commenced while the meeting was ongoing. The evidence of the person who recommenced the replevin, Curly Hines, was that he did so before anyone went to the meeting in Clayton that day. These statements, which were admitted without objection or cautionary instruction in the first instance, and upon solicitation by the Bank in the second, were not capable of differing interpretations, they admit only one interpretation. If this was not enough, Mr. Jones admitted that simply calling the trucks back to the store constituted recommencing the replevin. (Tr. 766, lines 19-22)

None of these representations are remotely similar to the ones cited by The Bank Bank in its Brief (Bank Br. 95-98) to support the position that they are merely statements of opinion. A given representation can be an expression of opinion or a statement of fact depending upon the circumstances surrounding the representation. **Morehouse v. Behlmann**, 31 S.W.3d 55, 59 (Mo.App.E.D.2000); citing **Clark v. Olson**, 726 S.W.2d 718, 720 (Mo.banc 1987).

Consider the case of **Brown v. Hannibal Anesthesia Service, Inc.**, 972 S.W.2d 646 (Mo.App.E.D.1998). In that case, this Court found a company's promise to allow an

employee to enter its practice as a partner upon the expiration of his then current contract sufficient to constitute a fraudulent misrepresentation. "Although Employee faces a formidable, if not insurmountable challenge in proving that Practice in fact had no intent to make him a partner at the time it made the alleged representations, such difficulties have no bearing on whether the Petition" stated a claim. Id., at 648, ft. 3. In **Next Day Motor Freight, Inc. v. Hirst**, 950 S.W.2d 676, 679(Mo.App. E.D.,1997), this Court held that a representation that checks would be issued at some future date failed to rise to a misrepresentation not because they were of events in the future, but because the speaker lacked authority to make statements on behalf of defendant, and there was no proof the statements were actually made. Id. Here there was evidence that the statement was made and there was no question but that Mr. Jones had authority to make them.

Courts have held that one can establish fraud by proving that a defendant breached a contract and intended to do so when he made the contract. **Chesus v. Watts**, 967 S.W.2d 97, 111 (Mo.App.W.D.1998). This Court has held that a promise to take future action is actionable if there is an allegation that the maker did not presently intend to perform. **Trotter's Corp. v. Ringleader Restaurants, Inc**., 929 S.W.2d 935, 940 (Mo.App.E.D.1996). If the representation is reasonably interpretable as expressing a firm intention of performing the promise, it is sufficient to support a claim of fraud. **Haberstick v. Gordon A. Gundaker Real Estate Co., Inc.**, 921 S.W.2d 104, 109 (Mo.App. E.D. 1996). Such a representation is present here, and Bianco believes there was

ample evidence to demonstrate a present intent not to perform. Therefore the cases cited by the Bank are inapposite.

III b. the representations were demonstrated to be false by the later actions of the Bank.

In the case cited by the Bank, **Botanicals on the Park, Inc. v. Microcode Corp.**, 7 S.W.3d 465 (Mo.App.E.D.1999), the court makes it clear that while the truth or falsity of a statement is determined at the time it was made, it may be proved by circumstantial evidence, "because fraud is rarely susceptible of direct proof." Id., at 468. Here, the actions of the Bank the very next day after making the representations showed that the Bank never intended to act as it promised. The words had barely left the mouths of Messrs. Jones and Kopsky before they refuted them, as is shown in each element.

(a) not demand further additional collateral. This statement was shown false in that the Bank was demanding additional collateral the very next day at the meeting on October 7th . Whether you believe Messrs. Paule, Bianco and Feder, or Messrs. Jones and Kopsky, in either rendition the Bank was demanding further collateral.

(b) allow the parties to meet with the manufacturers and the proposed buyer to complete the sale of the business. It was clear from the testimony of everyone who attended the meeting on the 8th that the only intention of the Bank was to allow the meeting on the 8th so as to demand from all parties more collateral. This was destined to prevent the

sale from being completed. Ms. Manty, Ms. McFaul, Mr. Bossi, Mr. Feder and Mr. Paule each stated that it was the Bank which interfered with the closing of the sale. The negotiations were not successful because of the Bank, the Bank's actions were bad faith, "they did nothing but basically screw the whole thing up." This was the tone of the testimony from the witnesses. One may infer from this that the statement was false when made.

(c) stop the replevin and taking of plaintiff Joel Bianco Kawasaki Plus, Inc.'s inventory if the meetings on October 7 and 8, 1997 occurred and the negotiations for the sale of the business proceeded in good faith. It is clear from the testimony of Mr. Jones himself that he felt no obligation to stop the replevin until the negotiations concluded. He testified that he ordered the trucks back on the night of the 7th and that this could be construed to constitute a recommencement of the replevin. It is clear from Mr. Hines and others that the replevin was underway during the negotiations on the 8th and halted, if at all, only after Mr. Jones left for the meeting in Clayton. Just because The Bank doesn't want to believe this testimony, the jury could have, and it was supported by testimony of others without objection or limitation. The evidence also was that the replevin continued on the 6th after Mr. Bianco was told by Mr. Jones it had stopped. The inference was overwhelming that Mr. Jones never intended to stop the replevin.

If one relies only on the Bank's infamous document, Trial Exhibit 36, the document states that the Bank may resume the replevin only upon the occurrence of two events: (1) the parties fail to reach a resolution, *and* (2) the Bank notifies Mr. Bianco it is resuming

the replevin. No where does the document say the Bank can resume the replevin once the meetings occur. The agreement itself does not say the resolution has to occur on October 8th . Yes, the meeting must take place or the replevin will resume, but the agreement does not speak to what constitutes a resolution once the meeting commences, as Mr. Jones admitted. It also does not speak to when the resolution must occur. The matter of proceeding in good faith is implied in the agreement, as referred to in the Uniform Commercial Code, Article 2, Chapter 400 RSMo (1994). Is the Bank admitting it did not intend to proceed in good faith and allow the negotiations for the sale of the business? If so, then it proves the fraud itself, but one thinks it does not intend to make such an admission. Is it suggesting that "resolution" was intended to mean giving the Bank everything it wanted? This is also an unlikely interpretation, given Mr. Bianco's overall goal. The only meaning left is the one Bianco understood, and the one the Bank never intended to fulfill.

(d) attend the meetings and make a substantial effort to resolve the sale of the business. Mr. Kopsky indicated what he believed constituted a substantial effort when he said that he had made a commitment that the Bank would do its share, and this meant a financial commitment. Mr. Bossi agreed that is what he understood Trial Exhibit 35 to mean. Mr. Jones stated that he intended Trial Exhibit 35 to be relied on by others. However, the Bank never made any financial commitment once it received Mr. Bianco's new collateral on the 6th.

(e) not recommence the replevin and taking of the inventory without advising plaintiff Joel Bianco that a resolution cannot be achieved and the defendant was going to continue the replevin and taking. Mr. Bianco was never advised by anyone from the Bank that the replevin was recommencing. He heard it from Messrs. Maurer and Fisher. See, item (c), above.

III c. the Bank knew the representations to be false at the time made, which is all that is required under case law.

Again, reference to the Botanicals on the Park case, cited above, shows that if the jury could have inferred that the Bank knew its representations were false, or was ignorant of the truth, this would be sufficient to prove this element of fraud. Id. As shown in the last section on falsity, the evidence was more than sufficient to show that Mr. Jones never intended not to ask for additional collateral, never intended to halt the replevin until the negotiations were complete, but rather intended to allow the sale to go through only if he was fully satisfied, that is, paid off. In addition, the Bank's taking of collateral from Mr. Bianco, a deed on his house and boat, when Mr. Jones valued those items at zero at the meetings on the 7th and 8th, is further evidence of his intent on the 6th not to follow through on his representations. Why take the collateral and not place any value on it unless you intended to demand more? Yet this is not what Mr. Jones told Mr. Bianco, and not what he had his counsel relay to Mr. Bianco's counsel and others on the 6th. There is substantial

evidence by which the jury could infer that Mr. Jones knew his representations were false on the evening of October 6th when they were made.

If more evidence is needed, consider Mr. Kopsky's blatant lies to Mr. Paule. First Mr. Paule was told that the Bank only intended to open with a demand for all of its deficit, but that it would concede attorney's fees and costs of replevin. When a hue and cry arose from all creditors about the attorney's fees and costs of replevin, the Bank stood pat, and refused to concede a dime. Then Mr. Kopsky told Mr. Paule that he had negotiated a secret deal with the manufacturers which he could not reveal. The manufacturers flatly and immediately denied this on October 8, 1997 and at trial.

When this evidence is viewed in its totality, in the light most favorable to the Respondents Bianco, as this Court is required to do, the burden of evidence was met that the Bank never intended to comply with its representations. Fraud "has to be established by a number and variety of circumstances, which, although apparently trivial and unimportant, when considered singly, afford, when combined together, the most irrefragable and convincing proof of a fraudulent design." **Chesus v. Watts**, 967 S.W.2d 97, 113 (Mo.App.W.D.1998); citing **Allison v. Mildred**, 307 S.W.2d 447, 453 (Mo.1957). Such is the nature of Bianco's proof in this case.

III d. the Bank clearly intended all parties including respondents to act on the representations.

It is inescapable that Mr. Jones intended Mr. Bianco to rely on his representations. Why else make such a grandstand play of commencing the replevin, demanding $240,000.00, and then demanding that Mr. Bianco sign Trial Exhibit 36 before he stopped the replevin? Mr. Jones also admitted that he intended the recipients to rely on Trial Exhibit 35. (Tr. 302, lines 14 - 21) Mr. Bianco certainly testified that he relied upon the statements, and that Mr. Jones acquiesced when Mr. Bianco said: "This is done quickly, I know you have what you need, . . . I hope you're of good moral business character;" and Mr. Jones responded: "Yep, sure. We've had no problem with you. Sure." (Tr. 451, lines 10-14)

The Respondents had a right to rely on the Bank's representations. The Bank goes through a strained argument that it was clear that Maurer and Fisher were going to use the letters of credit to fund the purchase, and therefore Mr. Bianco could not rely upon the Bank's misrepresentations. (Bank Br. 115) But this argument is fatuous. It is reason why the Bank would not rely on representations of Mr. Bianco, but makes no sense as a reason Mr. Bianco would not rely on the Bank, and Respondents will not dignify it with further refutation, other than to point out that Mr. Bianco testified that he always believed the Bank would be paid, and Trial Exhibit 12, his contract with the buyer, said as much in black and white.

The Bank also misstates the time at which Trial Exhibits 34 and 35 were executed, (Bank Br. 116), suggesting that they were executed after Trial Exhibit 36 was signed. Mr. Kopsky, the author, states that Trial Exhibit 34 was written and sent during the day before

Trial Exhibit 36 was written “that evening.” (Tr. 841) Trial Exhibit 35 says in its body that it was being faxed “simultaneously” with Trial Exhibit 34, which is enclosed.(Appendix A001)

III e. the representations were material as shown by the evidence.

The test of materiality is whether the misrepresentation "would be likely to affect the conduct of a reasonable man." **Constance v. B.B.C. Development**, 25 S.W.3d 571, 583 (Mo.App.W.D.2000); citing **Travelers Indemnity Co. v. Harris**, 216 F.Supp. 420 (E.D.Mo.1961). This is a question of law, and it is only relevant to whether a reasonable man would consider the representations material. Constance, 25 S.W.3d at 583. It is not a question of any one of the misrepresentations, but the misrepresentations taken as a whole, and the manner in which they were made. While the evidence is viewed in the light of the reasonable man, it also must be viewed in the same light that a reasonable man would view the evidence given the circumstances and the context of is use. **Chesus v. Watts**, 967 S.W.2d 97, 110 (Mo.App.W.D.1998).

Clearly, the reasonable man would not have borrowed money from his mother, whom he knew borrowed the money herself, and would not have posted his house and pleasure boat as collateral, which he had never done before for the business, on the off chance that an additional two days would allow him to close a deal with four manufacturers and a buyer over whom he had no control. This is not reasonable unless the Bank assured

Mr. Bianco that it would encourage these things to happen and make a "substantial effort" to see that they did by making a monetary concession. Nor is it reasonable that Mr. Bianco would believe that he could close the sale unless he believed that the replevin would stop until the negotiations were complete. It is unreasonable to believe the position the Bank is now taking. It is reasonable to believe that they made the representations Respondents claim they did, and that Respondents relied upon them, based upon Respondents conduct. As a result, it is reasonable to believe that the representations were material to Respondents, and would have been considered so by the reasonable man.

The Bank attempts to argue that Bianco was already obligated to provide additional collateral by the terms of the security agreements. This is a twisted interpretation of those documents. The Bank relies on the language: "You [the Bank] may demand more security or new parties obligated to pay any debt I [JBKP] owe you as a condition of giving up any other remedy." (Bank Br. 105, Trial Exhibit 89)

First, this provision only says that the Bank may demand additional security, it does not obligate the borrower to provide it. The Bank's remedy is to not give up some other remedy if the borrower refuses the additional security. More importantly, **the Bank was not giving up any remedy, which was a condition to demanding additional security.** It did not have the right under Missouri law to seize the goods covered under the purchase money security interests of the manufacturers. Della Moon admitted this. Nauni Jo Manty and Donald W. Paule, both experienced attorneys in this area of the law, testified to this fact. The Bank presented no evidence to the contrary. To give up the collateral of others is

not to give up a remedy to which the Bank is lawfully entitled. It was merely stopping a wrongful action. At least two of the creditors, Bombardier and Kawasaki, had put the Bank on notice that the actions were wrongful.

The Bank did have a right to seize the collateral not covered by the purchase money security interests, but it had already done this to a large extent, and it did not give up its right to proceed, it only delayed it. The Bank never presented any evidence of any remedy it gave up, either to the trial court, or to the jury, or to this Court in its Brief. It will undoubtedly make up some remedy it gave up in its Reply, but the barn door is already closed. **If the Bank truly thought it was entitled to the additional collateral under the security documents, what was the need for Trial Exhibit 36,** drafted by Bank's counsel who attempted to recite consideration in exchange for the new collateral? There was none but for the fact that the Bank knew it was not entitled to the additional collateral. Nowhere does trial Exhibit 36 say: you are obligated to provide this additional collateral under the previously signed security documents. Documents found in Trial Exhibit 117 would have sufficed under the Bank's theory of the case, but it insisted on executing Trial Exhibit 36 instead.

In addition, the Bank admits it was not unsecured, but only undersecured. (Bank Br. 105-106) However, it was only undersecured if the letters of credit were called. There was still a possibility that they would not be called, as the sale could have made all parties whole without demand on the letters. Bombardier conceded $50,000.00 and agreed to reduce its letter by the same amount. Continued negotiations could have produced an

additional $50,000.00 from other creditors, the Bank and the buyer combined, and removed any need for the letters of credit. The Bank was **oversecured** as of October 6, 7, and 8, 1997, and until the transaction was concluded.

III f. the damages were quantifiable and were quantified in the evidence.

The Bank challenges Respondents' damage evidence. This objection was not preserved below. In addition, the objection is not well taken.

First, the Bank is incorrect when it asserts that "Bianco is staking its damages on the mistaken belief that Meramec's alleged misrepresentations were the proximate cause of the loss of additional collateral." (Bank Br. 118) The belief is not a mistaken one. Every witness not connected to the Bank who was present or involved directly on the 7th or 8th: Ms. McFaul, Ms. Manty, Mr. Paule, Mr. Feder, and Mr. Bianco; all testified that the only reason the sale was not consummated was because of the Bank. But for the Bank's actions, the sale would have closed and Bianco would not have suffered any losses. All of the creditors would have been paid amounts as they agreed. The Bank also ignores the fact that the trial court dismissed Ms. Love as a Plaintiff because he found her a creditor of Bianco. (Tr. 687, lines 10-12). Since Bianco is obligated to pay her back, that is damage suffered.[32]

[32] The Court may take judicial notice of its own file which contains a partial

The trial court was aware of its ruling, and allowed Bianco to argue these damages. Clearly, the trial court properly found that the amounts advanced by Ms. Love were legitimate obligations of Respondents.

The Bank suggests that the business was eventually sold to Mr. Fisher (Bank Br. 120), but the evidence is clear that this was not done as contemplated, not to the same corporation, and not without great expense in the form of consent judgments from Mr. Bianco and his company, as well as another $25,000.00 borrowed from Ms. Love two months later. Again, every witness not connected to the Bank testified that the only reason the sale was not consummated as intended, paying off the manufacturers if not the Bank as well, was because of the Bank.

While the Bank correctly states that the measure of damages is sometimes the benefit of the bargain in a fraud case, where the benefit of the bargain rule is inadequate, other measures of damages may be used. **Dierkes v. Blue Cross and Blue Shield of Mo.**, 991 S.W.2d 662, 669 (Mo. banc 1999). Clearly the benefit of the bargain is inadequate in this case unless the bargain is defined as the right to conclude the sale with all manufacturers and the Bank being paid off. This is a logical interpretation and one justification for the damage award which is supported by the evidence.

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assignment of the judgment here to Ms. Love based on the obligations created by her advances. This assignment was filed in the court of appeals on April 20, 2000, as required by Missouri law.

It is logical to define the benefit of the bargain as the sale of the business; Plaintiffs bargained to allow the sale to conclude without interference by the Bank. All of the damages claimed directly resulted from the fraud perpetrated by the Bank. There was ample testimony from Nauni Jo Manty, Mark Bossi and Gary Feder, independent third parties, as well as others, that the sale would have been completed but for the actions of the Bank. The Bank's argument that Respondents received no property of value loses sight of what was bargained and misrepresented. Once again, the Bank attempts to support its argument by its myopic view of the facts.

Secondly, the simple benefit of the bargain was inadequate as the sole measure of damages in this case. Bianco suffered mental anguish, humiliation, and pain and suffering from the acts of Defendant. The jury could assess its own value to these items, which were argued without objection to the jury. Mr. Bianco also testified to $800,000 in damages in loss of reputation and loss of good will in the business, again without objection.

The courts have repeatedly held that in addition to general damages (benefit of the bargain) plaintiffs may recover special damages which are the proximate result of the fraud, if any. **Salmon v. Brookshire**, 301 S.W.2d 48, 56 (Mo.App.1957). Pain and suffering and mental anguish are recoverable in an action for fraud. **State ex rel Moore v. Morant**, 266 S.W.2d 723, 727 (Mo.App.E.D.1954). Loss of reputation has long been considered a special damage. Loss of good of will is the loss of the reputation of a corporation. Mr. Bianco testified without objection to the loss of reputation and the loss of good will which he suffered.

These special damages would easily justify twice the verdict reached by the jury. Defendant's argument concerning damages is simply not preserved and without merit.

III g. the Bank failed to preserve its objection to any lack of evidence on any issue but knowledge of falsity at the time made.

The Bank is barred from making its argument concerning damages as it objected to absolutely ***none*** of the damage evidence at trial. It also failed to preserve any objection to the fraud evidence except that which went to the element of knowledge of the falsity at the time it was made. The record is devoid of any other objection. The Bank is now precluded from making such objections. Unless there is a specific objection to evidence which contains the proper ground for its exclusion, nothing is preserved for review. **Doe v. Alpha Therapeutic Corporation**, 3 S.W.3d 404 (Mo.App.E.D. 1999); **DeRossett v. Alton and Southern Railway Company**, 850 S.W.2d 109, 111 (Mo.App.E.D. 1993); **Wolfe v. State ex rel. Missouri Highway and Transp. Com'n,** 910 S.W.2d 294, 297 (Mo.App.W.D. 1995). The Bank also failed to object to the damage Instruction No. 9, MAI 4.01, which it would have had to do to preserve this issue for review. Doe, supra.; **Senu-Oke v. Modern Moving Systems, Inc.**, 978 S.W.2D 426, 432 (Mo.App.E.D. 1998).

Finally, the decision whether to grant a new trial based on the size of the jury's award rests with the trial court. **Heins Implement Co. v. Missouri Highway & Transp.**

Comm'n., 859 S.W.2d 681, 692 (Mo. banc 1993). Appellate courts defer to the trial court's ability to judge the credibility of the witnesses and to assess the impact of alleged trial errors upon the jury. Id. The appellate court is limited to inquiring whether the jury's verdict is supported by substantial evidence or, stated another way, whether the amount of the verdict is responsive to the evidence on the issue of damages. Id. The opinion of a single, qualified witness constitutes substantial evidence. Id. **Simul Vision Cable Systems Partnership v. Continental Cablevision of St. Louis County, Inc.**, 983 S.W.2d 600, 605 (Mo.App.E.D.1999). The trial court reviewed all of the evidence in light of the motion for new trial which the Appellant presented, and denied that motion. This Court should not overturned that sound discretion, no good grounds for doing so having been presented.

IV. The trial court did not err in overruling the Bank's objections to Instruction No. 7, and in denying post-trial motions because the Bank did not make any properly preserved objection to the instruction in that it did not make an objection prior to the giving of the instruction which was not corrected as requested by the trial court, and the instruction properly defines the law when read as a whole.

STANDARD OF REVIEW

The standard of review which we will apply to the issue of instructional error depends on whether or not Plaintiffs have properly preserved this claim for review.

By failing to comply with Rule 70.03, Plaintiffs failed to preserve the giving of this instruction as error for review. We are thus limited to determining whether the giving of this instruction constituted "plain error" under Rule 84.13, which states that "plain errors affecting substantial rights may be considered by the court, though not raised or preserved, when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom." As Judge Hanna notes in his concurring opinion, such plain error must appear on the face of the judgment.

French v. Missouri Highway and Transp. Com'n, 908 S.W.2d 146, 150 (Mo. App.W.D. 1995).

ARGUMENT:

The Bank during the instruction conference at trial did voice a limited objection to Instruction No. 7, requesting that the instruction acknowledge that Defendant knew the representation was false at the time it was made. (Tr. 872) The trial court accepted and adopted this change. (Tr. 874)

The trial court specifically asked whether either counsel had any objections to the instructions given.(Tr. 871-872) Counsel for the Bank raised a specific objection to Instruction No. 7 (Tr. 872-873), but not the objections the Bank is making here on appeal. While Bianco submitted rejected Instructions A and B to the trial court (Tr. 873), the Bank did not.

To the extent the Bank asked for changes to the instruction, the changes were made. Since the Bank asked for no further changes, and made no further objections to the proffered instructions, it can not claim any harm by Instruction No. 7 as given. Missouri Supreme Court Rule 70.03.

> Rule 70.03 (as revised in 1994) requires specific objections to instructions be made prior to submission of the case to the jury. It states in relevant part: Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failing to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

French, supra., 908 S.W.2d at150.

The Bank's argument, albeit not preserved here, is that the Instruction No. 7 did not properly describe to what the representation was material, but merely stated that it was material to the plaintiffs. To prevail in this argument, the Bank must show that the error, if it was error, resulted in manifest injustice or a miscarriage of justice. Id. This it cannot do. (See, Point V of Argument, below)

The Bank also goes on at length about the multiple parts of the First paragraph of Instruction 7, to which it also did not object. The Bank continues to misstate when the various parts of the representation were made. It is clear from the evidence that all of the misrepresentation was made prior to or simultaneously with the execution of Trial Exhibit 36. No matter how many times the Bank says it isn't so, it does not change the testimony of the Bank's own witnesses confirming this fact.

The representations were a whole, made collectively to induce Bianco to act, and were not made separately. They are not multiple theories of recovery as the Bank would have it, but one continuous string of representations all made on October 6, 1997, and codified in Trial Exhibit 36. The instruction asks the jury to take them as a whole. If the Bank's argument of multiple theories had any weight or validity, the various parts of Paragraph First would have to be separated by the disjunctive "or" rather than the conjunctive "and." This is not the case, even by the Bank's admissions. (Bank Brief, Pl 131) It was the totality which induced Bianco to rely and act, and the totality was one act with several elements, a single theory of recovery as sanctioned by MAI.

The Bank asserts that the use of the words "based upon" led the jury to believe that the trial court had already determined that the representations occurred. To accept this argument, one must completely disregard the phrase "if you believe" which prefaces the entire instruction, and ignore Instruction No. 3 (LF 86) which is the MAI 2.02, Facts Not Assumed. The Bank ignores these parts of the instructions so that its argument appears rational. It is not.

Nor is the reference to the jurors' question submitted to the judge (Bank Brief 135) of any help to the Bank's argument. The "first statement" could as easily refer to paragraph First as to the first subpart (a). Indeed, if the jurors meant subpart (a) why did they not say so. Nothing is obvious from this note, and the trial judge returned the only comment which a competent and experienced trial judge could or is allowed to return by court rule and case law.

The Bank seems to argue at one point that the result did not comport with the pleadings filed in this case, and was beyond the scope of the pleadings. (Bank Brief 133-134) Respondents believe that this argument is defeated on the face of the pleadings, as well as on the facts as presented at trial. A petition will be deemed to have been amended to conform to the evidence by the implied consent of the defendant where the plaintiff adduces evidence which is not otherwise relevant to an issue in the case and the defendant does not object that such evidence is beyond the scope of the pleadings. **Metro Waste Systems, Inc. v. A.L.D. Services, Inc.**, 924 S.W.2d 335, 339 (Mo.App. E.D. 1996); citing Missouri Supreme Court Rule 55.33(b) and other cases. Such is the case here where the

evidence is replete with admissions which would allow the jury to find that the fraud occurred exactly as the instruction states. This is exactly what occurred. To the extent The Bank's argument goes to the pleadings, it must also fail.

V. The trial court did not commit plain error giving Instruction No. 7 because the giving of said instruction did not result in manifest injustice or a miscarriage of justice in that:

a. it did not assume a disputed fact, nor was it confusing or misleading; and

b. any confusion created was compounded by the Bank giving a converse instruction using the exact same language, and therefore the Bank cannot be allowed to benefit from its own error.

STANDARD OF REVIEW:

The standard of review is as stated in the previous Point IV of this Argument.

ARGUMENT:

The Bank argues that Paragraph Fourth of Instruction No. 7 does not properly state the element of materiality as required by MAI 23.05. But when paragraph Fourth of Instruction 7 is read with paragraph Fifth, as it must be, it is clear that the misrepresentations were material to the plaintiffs in providing additional collateral. No other reasonable or logical interpretation could result, and it is not credible to say that the jury was confused. The Bank fails to demonstrate how this wording resulted in manifest injustice because the claim cannot be demonstrated. Simply saying that the wording was

prejudicial does not make it so. Any ordinary juror would understand after four days of trial and this instruction what was being stated. Plain error is not a doctrine available to revive issues abandoned by selection of trial strategy or oversight. **Senu-Oke v. Modern Moving Systems, Inc.**, 978 S.W.2d 426, 431 (Mo.App.E.D.1998). That is what the Bank is attempting to accomplish here. It had more than reasonable opportunity to object to the Instruction at trial, and chose not to do so. On the face of the judgment there is no plain error.

The Bank argues that Instruction No. 7 was bound to and did confuse the jury by submitting five multiple representations in one instruction. (Bank Brief 131-136) Curiously, the Bank fails to advise this Court in its entire Brief that it submitted an identically worded instruction as a converse, even though the fact was one briefed to the court of appeals. Instruction No. 8, Appellant's converse instruction, read as follows:

INSTRUCTION NO. 8

Your verdict must be for defendant unless you believe:

First, defendant induced plaintiffs into providing additional collateral to defendant based on the representations that defendant would:

(a) not demand further additional collateral; and

(c) stop the replevin and taking of plaintiff Joel Bianco Kawasaki Plus, Inc.'s inventory if the meetings on October 7 and 8, 1997 occurred and the negotiations for the sale of the business proceeded in good faith; and

(d) attend the meetings and make a substantial effort to resolve the sale of the business; and

(e) not recommence the replevin and taking of the inventory without advising plaintiff Joel Bianco that a resolution cannot be achieved and the defendant was going to continue the replevin and taking;

intending that plaintiffs rely upon such representations in providing the additional collateral, and

Second, the representations were false, and

Third, defendant knew that the representations were false, and

Fourth, plaintiffs relied on the representations in providing the additional collateral.

MAI 23.05, 33.05

Submitted by Defendant

(LF 91)

Since Instruction No. 8 is identical in wording in the paragraph First to Instruction No. 7, any error in the Instruction was invited by the Bank. An appellant cannot rely on invited error on appeal. **Roth v. Roth**, 760 S.W.2d 616, 618 (Mo.App.E.D.1988). The doctrine has been applied where the appellant has submitted a complained of jury instruction. **Washburn v. Grundy Elec. Co-op**., 804 S.W.2d 424, 430 (Mo.App. W.D.1991).

Missouri courts have applied the theory of invited error to converse instructions given by appellants. In **Fowler v. Park Corporation**, 673 S.W.2d 749 (Mo. banc 1984),

where the defendant failed to object to the plaintiff's instruction which erroneously defined the defendant's duty of due care, the Supreme Court said the defendant in effect adopted this erroneous instruction by using the term "negligence" in the defendant's converse instruction and by failing to offer a definition of "negligence" which differed from plaintiff's definition. Id., at 756. By this conduct, the Supreme Court concluded, the defendant waived its right to challenge the erroneous definition on appeal. Id. See, also **Beeny v. Shaper**, 798 S.W.2d 162, 164 (Mo.App. E.D.1990).

The same reasoning applies here. The Bank used the identical phrase in Paragraph First of its converse Instruction No. 8 a it complains of in Instruction No. 7. The error, if any, is clearly invited and cannot be held to be plain error. As a result of Fowler and Beeny, The Bank's point must be denied.

CONCLUSION

Appellant Bank has tried desperately to defeat the verdict of the jury, who deliberated for many hours in arriving at this result. It has raised arguments almost all of which are presented for the first time here on appeal. None of the arguments lead to a conclusion that Appellant did not have a fair day in court, or that it was denied justice. In fact, the trial judge gave Appellant Bank every benefit of the doubt, and every opportunity to make its case. Having done so, it serves neither justice, the courts, nor the parties to

reverse the judgment and require the case be tried again. The sound judgment of the trial court should be affirmed.

Respectfully submitted,

PAULE, CAMAZINE & BLUMENTHAL, P.C.
A Professional Corporation

By: _____
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Thomas M. Blumenthal, MBE #25601
165 N. Meramec Avenue, Sixth Floor
St. Louis (Clayton), Missouri 63105-3789
Telephone No. (314) 727-2266
Facsimile No. (314) 727-2101

Attorneys for Respondents,
Joel Bianco, Individually and as Statutory Trustee
for Joel Bianco Kawasaki Plus, Inc.

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that this 19th day of February, 2002, two (2) true and correct copies of the Substitute Brief of Respondent were delivered by courier Michael A. Campbell, Attorney at Law, Polsinelli Shalton & Welte, P.C., 100 South Fourth St., St. Louis, MO 63102, and mailed to William S. Daniel, Attorney at Law, Daniel Law Offices, P.C., 7012 West Main Street, Suite 1, Belleville, Illinois 62223-3031. The Brief was signed in compliance with Missouri Supreme Court Rule 55.03. Pursuant to Special Rule No. 1 (g) to Missouri Supreme Court Rule 84.06, a floppy disk containing the Brief, labeled and scanned for viruses and virus-free, was also hand delivered as above.

The undersigned further certifies as required by Special Rule No. 1 (c) to Missouri Supreme Court Rule 84.06 that the Substitute Brief of Respondent complies with the limitations contained in Special Rule No. 1(b). The number of words used in the Brief is shown to be 26,712 by the word count of the word processing system used in preparing the Brief. A copy of the word count printed directly from the word processing system is attached to this Certificate. The Brief was prepared using Word Perfect 8.0 using a Times New Roman font in 13 point size.

PAULE, CAMAZINE & BLUMENTHAL, P.C.
A Professional Corporation

By: _____

Thomas M. Blumenthal, MBE #25601
165 N. Meramec Avenue, 6th Floor
St. Louis (Clayton), Missouri 63105
Telephone No. (314) 727-2266
Facsimile No. (314) 727-2101

Attorneys for Respondent
Joel Bianco, Individually and as Statutory Trustee for Joel Binaco Kawasaki Plus, Inc.